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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 73.

H. J. HEINZ COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

## BRIEF FOR H. J. HEINZ COMPANY.

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### OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 1140-1152) is reported in 110 F. (2d) 843. The decision of the respondent, National Labor Relations Board, appears in the record at pages 197-229.

## JURISDICTION.

The decree of the United States Court of Appeals for the Sixth Circuit, denying the petition of H. J. Heinz Company to set aside the Order of the National Labor Relations Board, and granting the petition of the National Labor Relations Board for the enforcement of its Order, was entered on April 3, 1940. The petitioner filed its Petition for Writ of Certiorari on May 9, 1940, which was granted on June 3, 1940. This Court's jurisdiction is based upon Section 240(a) of the Judicial Code, as amended, and Section 10(e) of the National Labor Relations Act.

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## STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449; 29 U. S. C. A. Section 151, *et seq.*), are printed in the appendix to this Brief.

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## QUESTIONS PRESENTED.

1. Whether, under the provisions of the National Labor Relations Act, an employer which recognized the successful labor organization in an election conducted by the National Labor Relations Board, bargained collectively with it as the exclusive representative of employees for collective bargaining purposes, and reached an agreement with it concerning wages, hours, vacations, and other conditions of employment, which agreement was reduced to writing in the form of an official bulletin and posted on the employer's bulletin boards, with the consent of the Union, and is still in effect, committed a violation of Section 8(5) of the National Labor Relations Act by refusing to accede t the Union's demand that the agreement be embodied in a specific form of agreement bearing the signatures of the employer and the Union?

2. Whether, under the provisions of the National Labor Relations Act, the National Labor Relations Board has the authority to require an employer to embody the terms of any agreement reached with a labor organization, covering terms and conditions of employment, in a written, signed contract with such labor organization, if requested by it to do so?

3. Whether an employer may be found guilty of an unfair labor practice on the basis of isolated acts and remarks of a few minor supervisory employees, where there is no evidence that the employer authorized or knew of such acts and remarks at the time they occurred and there is undisputed proof that as soon as such acts and remarks were brought to the employer's attention, it promptly repudiated them and forbade any repetition thereof by its supervisory employees, which instructions were strictly followed?

## STATEMENT OF THE CASE.

The National Labor Relations Board, (hereinafter called the "Board"), has, by its Order, directed the petitioner (hereinafter referred to as the petitioner or as the "Company") to cease and desist from alleged violations of Section 7, 8(1), 8(2) and 8(5) of the Act; to disestablish the Heinz Employees' Association, a labor organization of employees of the petitioner (hereinafter called the "Association"); to bargain collectively with the Canning & Pickle Workers, Local Union No. 325 (hereinafter called the "Union"); to embody any understanding reached with the Union in a written, *signed* agreement, if requested to do so by the Union; to post notices in its plant that it will thus "cease and desist", "disestablish", and "bargain collectively"; and to notify a representative of the Board of steps taken to comply with the Order.

The petitioner herein seeks a review of the decision of the Court of Appeals for the Sixth Circuit, which decision denied petitioner's petition to set aside the Order of the Board and granted enforcement thereof.

Our argument in this Brief will be divided into two parts, corresponding to the two principal questions presented by this appeal. In the interests of clarity, the detailed facts relating to each of these questions will be deferred until the argument. In this statement only the general factual situation will be presented.

The two rival labor organizations involved in this case, *viz.*, the Union and the Association, began drives to organize the petitioner's employees early in the year 1937. Each organization demanded recognition as representing a majority of the petitioner's employees. The petitioner proposed that an election be held to determine

which organization represented a majority of the employees, but the Union would not agree and called a strike on May 24, 1937, without any notice or warning to the petitioner or the employees (R. 1034). After some conferences, which will be discussed later, and through the intervention of conciliation experts from the Federal and State Departments of Labor, an agreement settling the strike was reached, which agreement was signed by the Union, the Association and the petitioner (R. 1047, 1048; Board's Exhibit "16", R. 48, 49; 566). By the terms of this agreement, an election was to be held under the direction of the Board and the petitioner agreed to recognize and bargain with the successful organization. Sometime prior to the signing of this agreement (Board's Exhibit "16"), the Union had filed charges with the Board attacking the legality of the Association. The petitioner and the Association were not notified of the nature of the charges, but so that the Union might not be prejudiced in the event it lost the election, a stipulation (Board's Exhibit "17", R. 50; 566) concerning the charges was signed at the time of the election agreement. This purpose was so stated by Dewey, a conciliator for the United States Department of Labor, and by Porter, an attorney for the Board, who prepared the stipulation (R. 1049).

The consent election was held on June 8, 1937, as provided in Board's Exhibit "16", (R. 48, 49; 566) and was won by the Union with a vote of 1079 out of 1930 votes cast,[1] and on June 17, 1937, as required by the election agreement, the petitioner held the first of many collective bargaining meetings with representatives of the Union (R. 572; 1052).

1. In the opinion of the Court below, at page 1142 of the Record, it is stated that the Union received 1079 of the 1882 votes cast. The statement is undoubtedly the result of an inadvertent error in the preparation of the opinion inasmuch as the 45 challenged votes and the 3 void votes actually were cast.

At this first meeting, the Union negotiators presented a proposed contract embodying their demands (Board's Exhibit "18", R. 50-55; 573), and stated that while they had authority to negotiate a contract in that form, if any departures were made therefrom, it would be necessary to obtain the Union's approval (R. 1053). Two of petitioner's executives, who acted for the petitioner in the earlier negotiations, then stated that they represented the petitioner's Board of Directors and would have to refer to the Directors for approval of their acts (R. 1053; 1122).

Numerous meetings were held thereafter, at which wages were the principal topic of discussion, the Union having demanded an increase in wages of 20% (R. 1053-1057). At the suggestion of Wilner, attorney for the Union, Anderson, a vice president of the petitioner, attended one meeting of the negotiators on June 28 (R. 1056, 1057). The negotiations up to that point were orally reviewed for his benefit[2] and then Anderson stated that the situation had been reported to him by Riley and Shinabarger, the two officials who had negotiated for petitioner, (R. 1056; 1115; 1122); that everything Riley and Shinabarger had done so far had had the approval of the directors, and that since a 10% increase was the limit to which the petitioner could go on the matter of wages, the Union could take it or leave it (R. 1115; 1056; 1122). *He did not say, despite the unsupported findings of the Board, that Riley and Shinabarger had full authority to act for the petitioner* (R. 1116; 1056; 1122).

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2. The Court below, in its opinion at page 1143 of the record, as well as the Board, seems to consider Anderson's silence throughout the major portion of the meeting as improper. The truth of the matter, however, is that at the meeting a review of all the negotiations up to that point was read to those present (R. 1056; 1115; 1122), after which Anderson's comment was asked for by Wilner (R. 582) and was freely made.

Upon several occasions during the course of negotiations prior to the meeting of July 1, 1937, which is hereinafter referred to, Riley and Shinabarger had discussed the matter of the form of the agreement with Kracik, International Representative of the Union, in the presence of other Union representatives (R. 1058; 1122; 643-645). Kracik had indicated his willingness to enter into a "packing-house agreement" similar to that which the parent union had with packing-houses in the neighborhood of the petitioner's plant, and which took the form of a statement or bulletin to employees posted in the plant by the employer (R. 645; 1055; 1058; 1122).

The next meeting between the negotiators, following the meeting attended by Anderson, was held on July 1 (R. 1057). The Union representatives agreed to submit to a vote of the membership the question of the acceptance of the 10% wage increase offered by petitioner (R. 1058). After the Union representatives had left the meeting to carry the question to the members, Riley and Shinabarger, in comparing notes, realized that the Union representatives might not have understood that the petitioner did not intend to sign an agreement in the form first submitted by the Union, (R. 1058; 1065; 1121, 1122). To prevent any misapprehension on this point, Riley and Shinabarger attempted to recall the Union representatives (R. 1058; 1121, 1122). Kracik returned alone, and the petitioner's representatives stated to him that while the petitioner did not want to sign the contract tendered by the Union, it would integrate the agreement in official bulletins posted in the plant. Kracik indicated that this procedure was entirely satisfactory to him (R. 644, 645; 1058; 1122). That night the Union voted to accept the 10% wage increase, but not for a definite period, and, according to one of the Union's principal advisers and negotiators, went on record as

refusing to sign any contract with the petitioner (Respondent's Exhibit "2", R. 76-78; 640; 638, 639).

The next day the Union representatives reported the acceptance of the wage increase, and further negotiations that day led to agreement on other wage details, hours of employment, and a vacation plan, all of which matters were by agreement made effective as of July 1, 1937 (R. 1058). At this meeting Wilner was the only representative of the Union to indicate any disapproval of the petitioner's position with reference to the form of the agreement (R. 1059).

Between July 2 and July 14, conferences were held between the parties' attorneys, for the purpose of reducing the agreement to writing (R. 1060). One point, however, had not been settled between the negotiators, viz., the exemption, from overtime provisions, of work on perishable and seasonal goods (R. 1059). The draft of the bulletin discussed at the July 14 meeting (Board's Exhibit "20", R. 60-65; 588) contained a recital that the petitioner would not pay overtime for work on perishables and that the Union did not agree to that exemption. Riley, at the close of the meeting, stated that the bulletin would be posted if he and Shinabarger could obtain approval of it (R. 1060). The matter was then referred to Anderson and he objected to the failure to dispose of the overtime question, to the length of the bulletin, and to the complicated detail of the provisions relating to the handling of grievances. He also announced that he wanted to discuss the bulletin with some of the other directors (R. 1116, 1117; 1061, 1062).

Thereafter, another draft was prepared (Board's Exhibit "21", R. 65-68; 593) and finally, after additional negotiations (R. 593, 594), the bulletin (Board's Exhibit "22", R. 68-71; 594) was agreed to by the

parties and was posted on some thirty bulletin boards in the petitioner's plant (R. 1062, 1063) as the statement of employment conditions agreed to by the petitioner and the Union (R. 594). Despite the agreement and the announcement to the employees of its terms, a few days later the Union declared its disapproval of the form in which the agreement was evidenced and stated that in its opinion the form preferred by petitioner was in violation of the Act (Board's Exhibit "23", R. 71; 595). At the hearing, Wilner admitted in his testimony that the agreement as evidenced by the posted bulletin was binding upon the petitioner and that the *form* of the agreement was important, from the Union's standpoint, only for *psychological* (or "promotional") reasons (R. 608, 609).

The facts thus related of course concern the first of the two questions at issue on this appeal, viz., the question of the alleged refusal to bargain. The facts which are involved in the second question, viz., the petitioner's responsibility for conduct and remarks of supervisory employees, will be reviewed, for the sake of clarity, in the argument on that issue. However, it is proper to point out, at this point, that these facts can be reduced to a few simple propositions. The petitioner has been found guilty of violations of Sections 8(1) and 8(2) of the Act upon the basis of alleged acts and remarks of foremen, sub-foremen and straw bosses, which might be construed as partial to the Association and disparaging of the Union. These acts and remarks were of a casual, isolated nature and were indulged in, if at all, by only a few of petitioner's employees. They were stimulated by the heat and controversy of rival organization drives and all of them occurred *prior* to the strike and the election. Moreover, it is clear that none of the petitioner's executives or other responsible officials authorized, approved or ratified

them. On the contrary, as soon as the petitioner's officers were notified of the alleged improprieties, they promptly took steps to prevent any such acts or remarks on the part of the supervisory force. The Union itself, it may be added, indicated that it was satisfied with the action which the petitioner took.

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## SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that petitioner violated Section 8(5) of the National Labor Relations Act by not embodying in a formal signed agreement the agreement which was reached with the Union and which has been in effect for more than three years;

2. In holding that the Order of the National Labor Relations Board requiring an employer to cancel an existing agreement with the Union and to negotiate and sign a new agreement is justified by Section 10(c) of the National Labor Relations Act;

3. In holding that there was substantial evidence to support the Board's finding that petitioner violated Sections 7, 8(1) and 8(2) of the National Labor Relations Act;

4. In failing to hold that petitioner, through its responsible executives, assured officers and members of the Union that petitioner's attitude toward the organization and other collective activities of its employees was one of strict neutrality;

5. In holding that petitioner was responsible for the conduct and remarks of a few supervisory employees which petitioner neither authorized, approved nor ratified but on the contrary promptly repudiated;

6. In holding that petitioner still accords the Association recognition in violation of the National Labor Relations Act;

7. In holding that disestablishment of the Association is necessary to assure petitioner's employees that they are free to exercise the rights guaranteed to them by Section 7 of the National Labor Relations Act;

8. In holding that there was substantial evidence to support the finding of the Board that petitioner violated Section 8(5) of the National Labor Relations Act; and

9. In failing to hold that the bulletin containing the understanding reached between petitioner and the Union was binding upon petitioner and so considered to be by the Union.

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## SUMMARY OF ARGUMENT.

In order that the summary of our argument may be entirely clear, though brief, we combine with the following summary an analysis of the Board's Order against the petitioner. The Order (R. 228-229) is divided into two principal subdivisions, one of which is negative or injunctive in character, and the other affirmative. The affirmative portions of the Order (Subdivision 2) may be said to supplement and enforce the "cease and desist" directions (Subdivision 1). However, from the standpoint of substantive effect, the Order can be reduced to three principal parts, and our argument will be based upon this analysis of the Order.

### I.

The first part of the Order, which is represented by Subdivisions 1(b) and 2(b), directs the petitioner, in effect, to bargain collectively with the Union and, *"if an understanding is reached,* [to] *embody said un-*

*derstanding in a written signed agreement, if requested to do so"* by the Union. In the negative portion of the Order, this direction is phrased as an order to cease and desist from refusing to bargain collectively with the Union as the exclusive representative of the employees in the "appropriate unit".

This first part of the Order represents the most important issue on this appeal. Section 8(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain with the representative designated by the majority of his employees. The Board's Order, in substance, finds that this employer has committed an unfair labor practice, within the meaning of this Section, and therefore directs the petitioner not only to bargain with the Union, but also to enter into a *signed, written* agreement with the Union, if the Union desires that type of a contract. *Inasmuch as the record shows that the Union and the petitioner did enter into an agreement which has been reduced to writing, and is still in effect, this part of the Order is tantamount to a rescission of the existing agreement and a command to make a substitute contract.*

The Board bases its right to issue such an order upon its interpretation of the phrase "bargain collectively", that is, the Board holds that an employer must proceed according to the Board's conception of negotiation and must conclude such negotiation by entering into a formal written contract *signed* by both parties. The petitioner denies the validity of the Board's interpretation of the Act and submits that, by bargaining with the Union and by reducing the understanding to writing, the petitioner has fully complied with all of the obligations imposed upon it by Section 8(5) of the Act. The Board also seeks to justify the affirmative

aspect of its Order, by recourse to its power under Section 10(c) of the Act to issue such affirmative directions as it finds essential to promote the policy of the Act. However, before the Board may order either affirmative or negative relief, it must first find evidence that there has been a refusal to bargain within the prohibition of Section 8(5) of the statute, and petitioner respectfully submits that there is nothing in the record which in any way can be said to support a finding that the petitioner is guilty of a refusal to bargain with the Union. On the contrary, the record shows that the petitioner has gone beyond the process of bargaining, it has made an agreement which the Board cannot vitiate without perverting the objects of the Act.

## II.

### A.

The second part of the Order requires the petitioner to cease and desist from dominating or interfering with the administration of the Association (Subdivision 1(a)). Phrased in the affirmative (Subdivision (2(a)), the Order requires the petitioner (1) to withdraw recognition from the Association as the representative of its employees for collective bargaining purposes, and (2) to disestablish the Association as such representative. This portion of the Order is predicated upon Section 8(2) of the Act, which makes it an unfair labor practice for an employer to support or interfere with the formation or administration of a labor organization of his employees. The "cease and desist" aspect of the Order presents a simple issue: "Has the petitioner supported or interfered with the Association?" The Board has answered this question in the affirmative by finding support of the Association, based upon alleged tactics of certain minor supervisory employees in encouraging

the organization drive of the Association in its early stages. It will be conceded that there is no evidence in the record of any other support, such as the advancement of funds, the furnishing of facilities, and the like, or of any interference with the administration of the Association after its formation. The finding of support raises the second issue on this appeal, that is, *whether or not an employer is bound by isolated acts and statements of a few out of many supervisory employees, where it is shown that the responsible officials of the employer, far from approving and adopting such acts, promptly took steps to prevent them.*

The action of the Board in placing upon the petitioner responsibility for the conduct of unauthorized persons, ignores all principles of the law of agency, in that it makes such conduct binding without any proof or finding of either authorization or ratification, thus saddling the petitioner with liability without fault.

The affirmative subdivision of this part of the Order goes beyond the negative, in that it directs the petitioner to withdraw recognition from the Association and to disestablish it as the representative of its employees. To maintain and uphold this affirmative direction, the Board must not only show that the petitioner has supported and interfered with the Association; it should also demonstrate that the petitioner is recognizing it as a representative of its employees. This has not been and cannot be shown, as the petitioner has granted exclusive recognition to the Union, has dealt and is dealing with it, and has not recognized the Association as the representative of its employees since the consent election, which was held many months before the complaint in this case was issued.

B.

The third principal part of the Order (Subdivision 1(c)) is purely negative in character, in that it directs the petitioner to cease and desist from interfering with, restraining and coercing its employees in the exercise of their rights under the Act. To support this section of the Order, the Board must show that the petitioner has engaged in unfair labor practices within the meaning of Section 8(1) of the Act, which prohibits coercion and restraint of employees in the exercise of their rights under the Act. This portion of the Board's Order, it may be observed, presents substantially the same issue as the second part outlined above, in that the Board's finding of a violation of Section 8(1) is based, *not upon any charges of discrimination, unfair treatment, or the like,* but upon alleged acts of minor supervisory employees in attempting to persuade a few employees to refrain from supporting the Union.[3] Again, the issue is: "Is an employer bound by the isolated acts of minor supervisory employees, where it is shown that, as soon as such acts were brought to the employer's attention, it forthwith took steps to prevent their recurrence?" Upon the undisputed evidence in this case, which shows that the petitioner promptly and effectively took steps to prevent any unneutral conduct of its supervisory force, to the entire satisfaction of the Union, this Court should hold that the petitioner is not responsible for conduct of its supervisors which might be described as favoring the Association and disparaging the Union.

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3. We recognize that the Board consistently rules that violations of Sections 8(2) and 8(5) of the Act are *ipso facto* violations of 8(1), but, of course, if this Court should agree that the petitioner has not violated Sections 8(2) and 8(5), then only the alleged direct acts of interference would be in issue.

***It therefore follows that the petitioner has neither dominated the Association nor interfered with its employees in the exercise of their rights under the Act.***

**It might also be observed that the Board's Order directs the petitioner to post certain notices in its Pittsburgh plant, publicly confessing violations of the Act, but inasmuch as the notice to be posted is, in substance, a statement of a compliance with the Order, this part of the Order must fall with the parts described above.**

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## ARGUMENT.

### I.

### The Board's Order, Insofar as It Directs the Petitioner to Bargain With The Union and to Embody the Results of the Negotiation in a Written Signed Agreement, Is Not Within the Statutory Authority of the Board Under the Act and Is Therefore Invalid.

**As we have observed, the Board has ordered the petitioner to bargain with the Union and to enter into a written, signed agreement with it. The two aspects of this part of the Order are clearly interdependent, because the Board's finding of a refusal to bargain is predicated upon the fact that the petitioner refused to enter into a written agreement signed by both parties. *Therefore if the petitioner was within its legal rights in taking this position, there was no refusal to bargain and this part of the Order must fall in its entirety.*[4]**

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4. This interdependence of the direction to bargain and the direction to sign a contract is peculiar to the facts of this case, because, as

The question of the power or authority of the Board to require the petitioner to enter into a written, signed agreement with the Union at its request, is of course a question of law. However, we believe that we should fully state the facts with respect to the alleged refusal to bargain, because the facts of this particular case will provide convincing practical, as well as legal, reasons for holding that the Act does not require a written, signed agreement. Moreover, the facts will serve to point out the extensive and extravagant character of the Board's command, for, despite its protestations, the Board has not simply directed the petitioner to bargain and sign a contract; *it has usurped the right to weigh the adequacy of the bargain and it has in effect ordered the petitioner to rescind an agreement which is now in effect and to substitute something new.* It has ordered the employer to retrace a process of negotiation which has been consummated in an agreement, which is admittedly legal and binding (R. 608; 1065). It is also to be emphasized that this is not a case where the parties have reached a deadlock or *impasse,* which might conceivably entitle the Board to question the employer's good faith in refusing to make concessions or counter-proposals. *An agreement was reached, under which the parties are still functioning, and the Board has arrogated to itself the power to question the employer's good faith because the*

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indicated, the parties did bargain and reach an agreement. The Board's finding of a refusal to bargain hinges upon the petitioner's unwillingness to sign a formal agreement. Other factors mentioned in the Board's decision, such as the length of the negotiations, the petitioner's refusal to grant a 20% increase, its alleged unwillingness to treat with the Union as an equal in bargaining power, etc., should be of no concern to the Board. They are factors in the case, but this is not because they aid the Board. On the contrary, they demolish the Board's argument by illustrating its far-reaching and unconstitutional implications.

***Board does not like the form and shape of the final contract or the manner in which it was reached.***

As we have indicated in our outline of the argument, the Order in the instant case is predicated, and *must* be predicated upon a conclusion that the petitioner has refused to bargain collectively with the Union as the exclusive representative of its employees. The conclusion of the Board to this effect is, in substance, based upon three arguments. The first argument seems to be that the petitioner should be compelled to sign such an agreement, because the Board suspects there were dilatory tactics in the negotiations leading to the agreement which was ultimately reached. The second argument apparently reaches a similar conclusion, upon the theory that the petitioner did not make sufficient concessions to the demands of the Union. The third argument is that a written contract should be signed, because, if the Union's name appears as a signatory to the contract, it will give the Union the psychological advantage of being the equal of the petitioner in prestige and bargaining power.

Although these three arguments are separately made in the Board's decision, they can be reduced to one general proposition. The Board's decision concedes that the parties reached an accord as to wages, hours and working conditions, which was embodied in a written bulletin to the employees, and which was accepted by the petitioner and the Union as a binding agreement. It is that agreement which has determined and now determines the standards of wages, hours, vacations and working conditions prevailing in the petitioner's plant. The Board, however, complains that the agreement should not have been embodied in written bulletins, but should have been committed to a *formal signed instrument*. Obviously, there is no legal difference between a

written bulletin and a signed specialty. *Both are binding and fully integrated contracts.* The only excuse for requiring the petitioner to make an agreement in a form different from that of its choice is apparently that the particular form proposed by the Union and the Board may result in some intangible, psychological advantage desired by the Union. This is the fundamental ground of the Board's decision, for it is clear that the finding of a refusal is predicated, *not upon any failure to meet and agree (for the Board concedes that the parties did so meet and agree) but upon the hypothesis that the Union has been deprived of the psychological advantage of contracting as an absolute equal.* Thus, the gravamen of the crime with which this petitioner is charged seems to be nothing more than an *offense to dignity.*

It is petitioner's theory that the National Labor Relations Act requires the employer to bargain, but not to enter into any particular form of agreement. It is clear that there is no explicit provision in the Act which would compel an employer to sign a particular form of contract. The Board attempts to supply the Congressional omission by the argument that where an employer has refused to bargain, the Board has discretion to order affirmative relief, which affirmative relief may include the requirement of a written, signed agreement. This interpretation of the Act is not justified, for at least two reasons. In the first place, the relief which the Board may give must be construed by reference to the substantive provisions of the Act; the Board surely cannot command more than the Act itself requires. In the second place, if the Board should be given the authority to require an employer to enter into a particular form of agreement, there is no reason why it should not also dictate the substantive terms of the understanding. Any such construction of the Act would surely render it unconstitutional.

As we have indicated in our Statement of the Facts, the Union and the Association each presented the petitioner with a demand for recognition and a proposed labor contract. The Union presented its demand and contract on May 24, 1937, the day before the strike. The proposed contract, which is in evidence as Board's Exhibit "6", (R. 38-40; 246), need not be analyzed, except to state that it contained demands for a "closed shop", for preferential hiring, for fixed wage minima, for a 10% increase in rates, for a 40-hour week and time and one-half time for overtime, and for vacations with pay. The representatives of the Union who presented the proposed agreement were advised by the petitioner that the petitioner could not lawfully recognize the Union as the exclusive representative of its employees without some proof that a majority of the employees had designated the Union as their agent for purposes of collective bargaining (R. 1032, 1034). The Union officials suggested that they could prove their majority by permitting a count of their membership cards, *face downwards,* but the petitioner declared that such evidence was unsatisfactory, because the cards might not be genuine (R. 1033). The petitioner countered with a proposal (suggested to one of its officers by the Regional Director of the Board) that the question be settled by a Labor Board election (R. 1033). The Union officers agreed that they would present this proposition to the membership but no reply was ever received by the petitioner, because the Union, without notice, called a strike for the following morning, shutting down the plant (R. 1034).

In the early stages of the strike, the Mayor of the City of Pittsburgh attempted to solve the controversy by suggesting an election (R. 1039), to which the petitioner and the Association agreed (R. 1043; 1040). The Union, however, again submitted the question of an elec-

tion to its membership and reported to the Mayor that the proposal was not acceptable (R. 1041, 1043). In the midst of this deadlock, the Association again approached the management of the petitioner, with a claim to a majority representation, and tendered as proof petitions containing the signatures of more than a majority of the employees and affidavits of the organizers who had solicited the signatures (R. 1044). The petitioner's representatives test-checked the signatures, examined the affidavits and expressed themselves as satisfied with the correctness of the Association's claims (R. 1044).

The Association's representatives and the petitioner's officials then went into negotiation over a form of contract (R. 1045). The parties ultimately reached an understanding with respect to wages, hours, working conditions, etc., and their agreement was integrated in a bulletin which the petitioner mailed to its employees (R. 1046, 1047). The Association requested a written agreement, signed by both parties, but the petitioner's officials demurred and the bulletin was the result (R. 1046, 1047). Inasmuch as the plant was strike-bound at the time, the bulletin was mailed to the employees, instead of being posted on the bulletin boards (R. 1046).

The strike continued until State and Federal mediators again brought the parties together. The petitioner and the Association expressed their willingness to settle the controversy by means of an election supervised by the National Labor Relations Board but the Union demurred on the ground that if the Association took part in the ballot and defeated the Union, the Union might be precluded from filing a charge with the Board that the Association was company-dominated. To eliminate this stumbling block, the mediators made the same proposal that had been made by the Mayor of the City of

Pittsburgh, that is, that the election be held without prejudice to the Union's right to file charges against the Association (R. 1049). On this occasion, the proposed stipulation was accepted by the Union and an agreement was signed by all of the parties, viz., the petitioner, the Union and the Association. This agreement, Board's Exhibit "16", (R. 48, 49; 566), provided for an election to be held between the two labor organizations and contained the following paragraph on the subject of recognition:

> "The Company agrees to recognize the organization receiving the majority of eligible votes cast as the exclusive bargaining agency and will within ten (10) days, after announcement of election results, commence negotiations for the purpose of reaching an agreement affecting wages, hours and working conditions."

There is one significant fact with respect to this agreement which the Board neglects to emphasize, although it is established by the testimony of its own witness, Wilner, who was the attorney for the Union. Wilner objected to the paragraph just quoted because it did not require a "written agreement" (R. 569) but the Company's attorney insisted upon the omission of the word "written" (R. 600), and Wilner finally agreed (R. 604). This fact has a most important bearing on the sincerity of the stand which petitioner's officials took during the negotiations.

The election was held on June 8 as agreed and the Union was victorious by a vote of 1079 out of 1930 (R. 572). Beginning on June 17, representatives of the Union met with representatives of the petitioner in a series of negotiations with respect to a proposed agreement (R. 572; 1052). At the first meeting, the Union presented a draft of an agreement (Board's Exhibit

"18", R. 50-55; 573) which contained many of the demands made in the original proposed contract (Board's Exhibit "6" (R. 38-40; 26), described at page 20, *supra*), as well as several additional requests. For example, the second proposal asked for a 20% increase in wages instead of the 10% previously demanded, for a more liberal vacation plan (extending to employees of one year's service, where the previous proposal extended only to employees of five years' service or more), for a more elaborate seniority plan and for several holidays.

Two active directors of the petitioner, Messrs. Riley and Shinabarger, accompanied on some occasions by an attorney, handled most of the negotiations with the representatives of the Union (R. 581, 582). The personnel of the Union committee occasionally varied but most of the negotiation was handled by its attorney, Wilner, and by several international officers and agents (R. 572, 573). The Union was also aided by a priest, the Reverend Charles Rice (R. 582).

It would serve no useful purpose to review the various proposals and counter-proposals which were made and argued by the parties throughout the negotiations. The principal stumbling block was the Union's demand for a 20% increase (R. 1054), the petitioner taking the position throughout that competitive conditions in the industry would not justify more than the 10% increase to which it was agreeable (R. 1054-1056). However, by July 1, the parties to the negotiation seemed to have eliminated all of the highly controversial issues and the Union, at a meeting on that day, agreed to submit to its membership the question of the acceptability of the proposed 10% increase (R. 1057). At the close of this conference between the parties on July 1, the petitioner's representatives checked over the various items as to

which the parties seemed to be in agreement and became aware of the fact that the Union negotiators might have received the impression that the Company intended to embody the terms of the proposed understanding in a written, signed agreement (R. 1057, 1058; 1121). To correct this impression, they sent for Kracik, a national officer of the Union, who had been one of the Union's active representatives at the meeting, and informed him that the petitioner had not agreed to make a written, signed agreement for a definite term (R. 1058; 1122). Before this meeting, Kracik had indicated to the petitioner's representatives that he would be satisfied with a simple bulletin expressing the understanding reached by the parties, because his Union had followed a similar procedure in other agreements with local packing houses (R. 1058; 1122; 644, 645). When the petitioner's officials told him that they had not wanted to create the impression that the Company intended to sign a written agreement, Kracik again indicated that he would be satisfied, stating that such procedure would give him the advantage of being able to come to the petitioner every week or so with new demands (R. 1058; 1122). The issue being thus clarified, nothing further was said and Kracik returned to Union headquarters.

The Union voted to accept the Company's offer of a 10% increase and negotiations were resumed on the form of the contract (R. 1058). At the next meeting, the Company representatives reiterated their position that the agreement should be embodied in a bulletin to the employees and, although Wilner, attorney for the Union, objected to this procedure, he finally agreed to take up the problem of drafting the bulletin with the petitioner's attorney, Ebbert (R. 1059, 1060; 586). Ebbert thereafter prepared a draft of a bulletin and several discussions were had between Wilner and Ebbert with respect to its phraseology (R. 587). Finally, Wil-

ner and Ebbert seemed to reach an accord, but one point of substance was still undecided in that the petitioner insisted upon exempting work on perishable commodities from the overtime provisions of the agreement and the Union refused to agree (R. 1059, 1060). The proposed bulletin therefore stated that the exemption would be made but that the Union did not agree to it (Board's Exhibit "20", R. 60-65; 588). Wilner indicated his satisfaction with the bulletin in a meeting attended by Wilner, the Committee and Messrs. Riley and Shinabarger. Riley and Shinabarger stated, however, that they would have to obtain approval of the bulletin (R. 1060). The bulletin was submitted to Mr. Anderson, their superior,[5] who objected to several features in the bulletin (R. 1061, 1062). He thought the bulletin was too long and too difficult to understand, he considered that the grievance procedure was unnecessarily complicated, and he objected strenuously to leaving open the question of the exemption of work on perishable commodities (R. 1061). As he said, it would make the bulletin an agreement not to agree (R. 1061). The bulletin was therefore rewritten as to form and reduced as to content. This new

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5. The Board makes some point of the fact that Riley and Shinabarger had full authority to deal for the petitioner, apparently for the purpose of inferring that this reference to their superior was a repudiation of the agreement. The fallacy of this argument could be demonstrated but it is not necessary to do so. In the first place, the record shows that a revised bulletin was ultimately adopted. In the second place, it is no part of the Board's jurisdiction to attempt the specific enforcement of labor agreements. Perhaps the Board mentions the matter in order to create the impression that the petitioner delayed the negotiations but again that is no concern of the Board's. It is the essence of bargaining that each party shall strive to obtain the best bargain for himself and if the Board is to have the right to supervise the processes of negotiation, collective bargaining will become a one-sided farce. The Board's action contrasts strangely with the statement of Senator Walsh, a proponent of the Act, during the Senate debate prior to its passage. Referring to the negotiations between employers and unions, the Senator declared: "What happens behind those doors is not inquired into and the bill does not seek to inquire into it."

draft of the bulletin was then presented to Wilner, but Wilner was not satisfied with it, principally because the opening paragraph of the bulletin merely stated that the Company had "bargained with the certified collective bargaining agency for our employees" instead of referring to the Union by name. Other objections to the redrafted bulletin were made by the Union, principally on the subject of overtime pay. The Company, however, acceded to the demands of the Union with respect to overtime and as a result a third bulletin was drafted and accepted by both parties (R. 593). This final bulletin (Board's Exhibit "22", R. 68-71; 594) was then mimeographed and posted on 30 bulletin boards in the petitioner's plant (R. 1063). It recites that the Company had bargained and reached an understanding on the subject of wages, hours, etc., and closes with the statement that its terms are to remain in effect until further notice.

It is unnecessary to analyze the final bulletin, except to state that it covers the subjects of a 10% wage increase, of minimum hourly rates for male and female employees, of hours of work and overtime compensation, of vacations, of seniority and of the procedure for adjusting grievances. There is no doubt that this final bulletin constituted an agreement between the parties, as it recited, even though it was an understanding which could be cancelled by either party upon notice to the other. Company officials testified that they regarded it as a binding agreement (R. 1065; 1124) and this was admitted by Wilner (R. 608), the Union attorney, and one of the principal witnesses for the Board. Moreover, in literature circulated among its adherents after the bulletin was posted (Respondent's Exhibit "7", R. 87; 1027) and in its official news journal (Respondent's Exhibit "6", R. 82-87; 1026), the Union referred to the

bulletin as a contract between the Company and the Union.[6] The only point of objection to the bulletin was that it was not a written agreement, signed by both parties, which objection was made by Wilner at the time he accepted the terms of the bulletin and by Tasker, business agent for the Union, after it was posted (Board's Exhibit "23", R. 71, 72; 595).

From our point of view, there are three significant propositions revealed by the foregoing review of the record. In the first place, as we have already indicated, the bulletin was a binding, *integrated* contract and was so accepted by the parties to it. In the second place, although the Board seems to make something of the fact that the agreement was not for a fixed term (and, in fact, tried the case on a theory that a fixed term was essential if the Union desired it), it appears to be clear from the testimony of Kracik and Father Rice, both witnesses for the Board and negotiators for the Union, that *the Union did not want a contract for a fixed term and at one stage in the negotiations did not want any agreement.* Illustrative of this fact is the testimony of Father Rice, in which he admits that he wrote in a newspaper column conducted by him that "the workers, wanting peace, agreed to accept the terms, *but for no definite period and they refused to sign a contract with the Company.*" (R. 639; Respondent's Exhibit "2", R. 76-78; 640). The third, and most significant factor, is that the negotiations between the Union and the Company were not barren of results for the Union, as the Board would have one believe.[7] On the contrary, the Union achieved

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6. The news article (published October, 1937; Respondent's Exhibit "6" (R. 82-87; 1026)) recites that "after nine weeks of negotiating between the H. J. Heinz Company and the Canning and Pickle Workers Union, Local 325, an agreement was finally reached and posted on the bulletin boards * * *."

7. It is interesting to compare with the Board's implication that the petitioner was not sufficiently generous with the Union, the state-

many of its demands. This is clearly shown in the testimony of Wilner, which brings out the following: The Union demanded a 20% wage increase, and received 10%; it requested a 62½¢ minimum for men and got 60½¢; it demanded that men called out for work and not used would receive at least two hours' pay, to which the company acceded; it demanded the 8-hour day, the 40-hour week and time and one-half for overtime, which was granted; it requested double time for Sundays and holidays, and received time and one-half. It asked for a vacation plan of two weeks for employees of five years' service, three weeks for female employees of 15 years' service and three weeks for male employees of 20 years' service. Instead of that, the Union received a vacation with pay of one week for every employee who had a service record of one year or more (R. 618-620). To this Wilner added that, after the bulletin was posted, the Union presented and negotiated a number of grievances and other points with the Company, thus admitting that both parties treated the agreement as a working arrangement (R. 620). To all of this we may add that, although a considerable time may have elapsed in the preparation of the bulletin, once the parties had reached an understanding on points of substance, the bulletin stipulated that the wage increases and the overtime provisions would become effective July 1, which was the date upon which the parties were in accord on most of the points at issue.

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ment made by the Union's business agent, Tasker, in a letter sent to the petitioner two days after the bulletin was posted. Tasker says: "we realize that the concessions gained for the employees • • • were the direct results of our efforts and we are anxious to conserve for the Heinz employees the benefits which they so richly deserve and for which we strove so hard" (Board's Exhibit "23", (R. 71, 72; 595)). Compare also the Union's news story about the contract appearing in its official paper in October, 1937 (Respondent's Exhibit "6", (R. 82-87; 1026)).

With these facts in mind, and paying special heed to the three significant factors just outlined, we proceed to a discussion of the legal aspects of the case. It is obvious from our review of the facts that there was no actual refusal to bargain with the exclusive representatives of the petitioner's employees. On the contrary, there was extended bargaining with the Union, which resulted in substantial concessions for the Union and the employees. There is also no issue in the case of the failure of the Company to reach an accord with the Union. On the contrary, all parties agree that an understanding was reached and committed to writing, so that despite the efforts of the Board to confuse the issues by bringing in extraneous matters, there is only one point in issue—*"Is it an unfair labor practice for an employer, who has reached an understanding with the representative of his employees, to decline to embody that understanding in the particular form of agreement desired by the Union?"*

The National Labor Relations Act is silent on the subject of agreements between employers and the representatives of their employees.[8] Section 9 of the Act provides that the representatives selected by the majority of the employees in an appropriate unit "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *." Section 8(5) of the Act declares that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." The Act can be searched from its opening phrase to its close without

8. It is noteworthy that the Board has conceded in other cases (see, e. g. *Inland Steel Company v. National Labor Relations Board*, 109 F. (2d) 9 (1940)) that there may be instances where a written agreement is not required. This novel doctrine is the equivalent of saying that the intent of Congress depends upon the Board's decision in a particular case.

finding any evidence of an intent on the part of Congress that an employer be *required to reach any agreement with the representatives of his employees.*

The intent of Congress, with respect to the scope and effect of a legislative act, can be ascertained from three sources: (1) from provisions of other legislation on the same subject, (2) from the expressions of members and Committees of Congress and (3) from the fundamental scheme and object of the legislation itself. If these standards are applied in the instant case, the error of the Board's position becomes patent.

So far as similar legislation is concerned, it will clearly appear, upon analysis, that if Congress had intended to require the employer to sign an agreement, it would surely have spoken its mind on the subject. In the Railway Labor Act (45 U. S. C. A. § 151 *et seq.*), Congress was much more specific on the subject, for it declared that "it shall be the duty of all carriers, their officers, agents and employees, to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions * * *." In enacting amendments to the Merchant Marine Act of 1936, (June 29, 1936, C. 858, 49 Stat. 1985, 46 U. S. C. A. § 1101 *et seq.*) Congress was even more explicit, for it declared that the Maritime Labor Board should encourage employers and employees "to make and maintain *written* agreements concerning rates of pay, hours of employment, *etc.* * * *." (46 U. S. C. A. § 1254) If Congress had desired to go even this far in contemporaneous labor legislation covering the industrial field, surely it would not have been reluctant to put its thoughts into words.

The *expressed* intent of Congress is shown by the report of the Senate Committee on Education and Labor, recommending the passage of the Act, in which it is said that

"'the Committee wishes to dispel any possible false impression that this bill is designed *to compel the making of agreements or to permit governmental supervision of their terms.* It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory."

The author of the Act, Senator Wagner, expressed a similar view when he declared: "The law does not require an employer to sign *any* agreement of *any* kind. Congress has no power to impose such a requirement. An agreement presupposes mutual consent." To this Senator Walsh, a proponent of the Act, has added, that "employers are left free in the future as in the past to accept whatever terms they choose."

This Court has expressed similar views in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1937), in the following statement (page 45):

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' The Act expressly provides in § 9(a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is *likely* to promote industrial peace and may bring about the adjustments

and agreements *which the Act in itself does not attempt to compel.* * * *."[9] (Italics supplied.)

Where then does the Board derive the right to command the employer to do more than the literal provisions of the Act require? The Board's answer to this point is an argument which might be persuasive in a Congressional hearing to amend the Act but has no bearing upon its construction. The Board says—and whether this be the fact or not is indeed an open question—that the history of labor relations demonstrates that collective bargaining frequently results in written agreements signed by the parties to the negotiations. (With this finding may be compared the experiences of this particular Union in its dealings with the packing houses, in which bulletins similar to that involved in the present case have been used.) The Board then argues that since the Act condemns a refusal to bargain, the condemnation necessarily extends to a refusal to make the kind of agreement which usually follows from collective bargaining.[10] This method of argument, we submit, is not only illogical, it ignores the fundamental scheme and object of the Act, which, as we have indicated, provides the third—and determining—measure of Congressional intent. To emphasize this point, a brief analysis of parts of the statute is necessary.

The Act, in substance, performs two functions. In the first place, it provides a means for ascertaining and recording the selection of representatives for collective

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9. In *Virginian Railway Co. v. System Federation, etc.*, 300 U. S. 515 (1937) this Court placed a similar construction on the much stronger language of the Railway Labor Act which is quoted *supra*.

10. This is another example of the Board's inconsistent construction of the intent of Congress. Presumably if there was, in a particular industry, a tradition that signed contracts were not in order, the Board would not impose any obligation upon an employer in that industry.

bargaining and establishes the principle of selection by majority rule. This function is outlined in Section 9 of the Act which permits the Board to investigate conflicts as to representation and to certify the representative which has been selected by the majority. With this function of the Act, the employer usually has little or no concern. In the second place, the Act creates certain safeguards against employer interference with the exercise by employees of their right to organize and designate representatives for collective bargaining. At the same time the Act creates an agency to enforce these safeguards and provides a procedure for enforcement. Just as the Act has two functions, so the Board has two duties to perform and it is obvious that in the exercise of either duty, the Board may do no more than administer the substantive features of the Act.

The National Labor Relations Act is not a comprehensive labor statute. Thus, it is not like the English Labor Disputes Law, which not only regulates the conduct of employers, but also supervises the conduct and administration of unions and provides methods for the adjustment of labor disputes. It does not even approach in breadth the Railway Labor Act (45 U. S. C. A., § 151 *et seq.*), which regulates *both* the employer and the employee and which has created a statutory medium for the mediation of disputes and threatened strikes. The National Labor Relations Act does not provide for mediation or the arbitration of disputes. It does not regulate the activities of unions or the conduct of strikes, etc. On the contrary, it purports to cover but one limited field, that is, the protection from interference and restraint on the part of the employer of the worker's right to organize. It is noteworthy, in this connection, that criticisms of the Act for its one-sided operation are usually countered by the argument that the Act is designed *only to prevent the employer*

***from interfering with his employees*** **in the exercise of their right to organize and bargain collectively.**

This limited purpose of the Act is emphasized by an examination of its specific substantive provisions. Section 7 states, in general terms, the principle that employees have the right to organize and bargain collectively with an employer.[11] Section 8 buttresses this principle by prohibiting certain specific acts on the part of the employer which might tend to defeat the rights enumerated in Section 7. The acts prohibited are: (1) in Section 8(1), interference, restraint and coercion; (2) in Section 8(2), interference with or support of a labor organization; (3) in Section 8(3), discrimination as to hire, tenure of employment, etc., to encourage or discourage union membership. These prohibitions, which are negative in character, are obviously designed to prevent direct and open interference by the employer. However, Congress recognized, as the Senate Committee Report (May 2, 1935, Report No. 573) indicates, that the mere prohibition of direct interference would not suffice, because an employer might accomplish the same end merely by refusing to recognize the chosen representative of the employees and by dealing with the employees directly or through some agency not of their choice. As a consequence, Section 8(5) was added to make it an unfair labor practice for an employer to refuse to bargain with the designated representatives of his employees. The juxtaposition of Section 8(5) to the other subsections of Section 8, as well as the content of the Act as a whole, makes it clear that in Section 8(5) Congress was dealing with the same subject as it dealt with in Sections 8(1), (2) and (3), to wit, interference by an employer

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11. This statement of principle is the essence of the Act. If Congress had intended to do more than merely guard this right against interference, here was the point to do so.

with the right of his employees to select their own representatives for purposes of collective bargaining. It is equally clear that the prohibition contained in Section 8(5) was not designed as an instrument for forcing the settlement of labor disputes, or as a method of mediation or arbitration. This construction is borne out by the fact that the Act itself, in Section 13, declares that it shall not be construed *"so as to interfere with or impede or diminish in any way the right to strike."* If the Act had been designed as an instrument for compelling arbitration or compulsory agreement, it would surely have required employees, as well as their employer, to settle their disputes by agreement, rather than by resort to a strike which is the very negation of agreement.

This argument is by no means academic. It is true that the Act provides for *majority representation,* but it does not provide that the majority may *bind* the minority. Thus, a union which represents 51 out of 100 employees is the representative of *all,* but if the 49 dissenters do not like the terms which the union has made, they may refuse to work on those terms. In other words, they may strike, either *singly* or *collectively,* and their right to do so is specifically preserved by the Act. This being the case, how may it be said that the Act compels the employer to make a contract with a union when such contract *cannot* bind *all* the employees but can actually obligate only the *members* of the union.

May not this be a clue to the proper construction of the Act? In other words, is it not correct to say that the Act is not concerned with the *contract* which *may* result from negotiation, but with the *question of bargaining?* If the Act were designed to *compel contracts,* it would surely have ordained that the union selected by

a majority would have the power to *bind all* the employees and not merely the power to *bargain* for them. As a matter of fact, if Congress had attempted to bind the minority by the contract of the majority, it would undoubtedly have vitiated the validity of the Act.

The Board, in its efforts to convert the Act into a system of mediation, compulsory upon the employer alone, usually resorts to the recital of policy in Section 1 of the Act. This recital, which need not be set forth at length, declares, among other things, that it is the desire of Congress to encourage "practices fundamental to the friendly adjustment of industrial disputes" and to encourage "the practice and procedure of collective bargaining." This Court recognized the same principle in its statement in *Consolidated Edison Company v. National Labor Relations Board,* 305 U. S. 197 (1938), that the Act *"contemplates* the making of contracts with labor organizations." Conceding that the Act does seek to *encourage* collective bargaining and the orderly adjustment of disputes, it by no means follows that the limited and specific provisions of the Act can be therefore elaborated into a comprehensive statute on the subject of collective bargaining. The preliminary recitals, contained in Section 1 of the Act, clearly demonstrate that while the Act may seek to *encourage* collective bargaining, *it does so in only one direction, that is, by eliminating the obstruction to collective bargaining which might arise out of acts of interference on the part of employers.*[12] The scope and purpose of a statute is to be ascertained from the mischief or evil which it seeks to correct, not from the *hopes* of the legislators.

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12. This point is emphasized throughout the opinion of this Court in *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U. S. 1 (1937). For example, Chief Justice Hughes declares that "the theory of the Act is that free opportunity for negotiation with

The Board, in the instant case, has usurped the power of compelling arbitration which the law does not allow. It has forgotten the negative, prohibitory purpose of the statute and added an affirmative feature which is almost the equivalent of compulsory arbitration or mediation. If the Board may compel the employer to enter into a particular form of written agreement, on the theory that Congress designed the Act to prevent labor disputes, then there is no reason why it should not also usurp the right to dictate the terms of that agreement. This is not an idle warning. On the contrary, the Board's conduct in this case warrants the belief that, if it is not checked, the Board may some day arrogate that power. Thus, in its original decision in this case, which was subsequently withdrawn, the Board not only directed the petitioner to make a written, signed agreement, but also said that the petitioner should make that agreement for *a definite term.* In addition, a substantial part of the Board's *proposed decision* was devoted to the charge that the petitioner did not make sufficient concessions to the Union. If the Board may castigate an employer for not being generous and use this as a background for finding a violation, there is no reason why it cannot leap to the point of directly ruling that it is an unfair labor practice to refuse demands with respect to rates of pay, etc. If it can say that it is a trivial thing to refuse to sign the kind of an agreement wanted by the union where the union wants it for a particular advantage, it can just as easily measure the financial resources of an employer and say that a refusal to make a 5% increase in wages is so trivial that it must be motivated by a desire on the

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an accredited representative of employees is likely to promote industrial peace and *may* bring about the adjustments and agreements which the Act in itself *does not attempt to compel.*"

employer's part to deprive the union of the credit of obtaining an increase.

The Board has attempted to justify its extension of power by leaning on the tenuous theory that the petitioner has been guilty of a refusal to bargain, because it has not accorded to the Union the status of an equal in bargaining power.[13] This hypothesis attributes to Congress a most unrealistic desire to equalize all bargains. An employer may be strong financially or on the verge of bankruptcy. A union may be powerful in its numbers and its resources or it may be penniless. The one who is strong may be able, by virtue of his resources, to drive a better bargain. The comparison of the petitioner as an established enterprise with the Union as an infant organization may fit the instant case, but in another situation, the positions might well be reversed. The National Labor Relations Act does not pretend to alter the facts of collective bargaining; it merely prevents the employer from weakening the Union by the process of interference and coercion.

In the last analysis, the decision of the Board had its origin in the demand of the Union that it be given the psychological advantage of appearing with the petitioner as a co-signatory to a written agreement. It was Wilner, the attorney for the Union, who wanted this and he himself conceded, in his testimony, that he wanted it solely for "psychological reasons" (R. 608, 609), that is, for the purpose of enhancing the prestige of the Union and making it easier for them to obtain other members.[14]

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13. This unique doctrine has unique consequences. We suppose that had the Union demanded that the agreement be signed by Howard Heinz and that Mr. Heinz make a statement to the employees that the Union had served them well, it would be a denial of dignity to refuse.

14. The efforts of the Board to secure this psychological advantage for the Union seem to distort the objects of the Act in another respect.

If Wilner had a psychological reason for demanding a written agreement, signed by both parties, the representatives of the Company had an equally important reason for declining to grant his request. As several witnesses pointed out, the election left a great deal of bitterness and hostility among the employees (R. 737; 1108), almost half of whom had supported the Association in the election. The Union was making statements to the employees that they would be *required* to join the Union (R. 1067). Thus, Board witness Tasker, business agent for the Union, admitted the publication of an article (Respondent's Exhibit "1", R. 75, 76; 632), addressed to non-Union employees, in which it was stated "we are letting you know before time that every non-union member in the plant will have a limited time to join Local 325, and if they do not join we will not be responsible for anything that occurs in front of the H. J. Heinz Company one of these days." He also said that this was one of his standard ways of getting members (R. 633). The officials of the Company, realizing the situation which prevailed following the strike, determined to prevent any improper use of an agreement between the Union and the petitioner (R. 1067). They

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As Congress has indicated (House Committee Report, June 10, 1935, No. 1147) "No private right of action is contemplated (by the Act). Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint." This Court so interpreted the Act in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1937). In our view, this construction should require the complete elimination, as a factor in the decision, of any demand or desire of the Union for a psychological advantage. Nevertheless, the Board, in its condemnation of the petitioner for failing to give sufficient credit to the Union and in the requirement of its Order that the petitioner sign a written agreement with the Union *"if requested by it"* seems to show greater solicitude for the enforcement of private rights for the Union than for the protection of the public interest in protecting employees from interference with the exercise of their rights under the Act.

also believed that the Union had been guilty of unfair tactics in calling the strike without notice and in its conduct of the strike (R. 1101). For these reasons, they believed that it was necessary to take a firm stand and to refuse to accede to the demand of the Union that there be a written, signed agreement.[15] Whether their fears in this respect were justified or not, it is the fact that they took this position and that they were entitled to do so. Moreover, they were not arbitrary in the matter, for in the bulletin which they prepared, they recited that the terms were reached by negotiation between the petitioner and the exclusive representative of the employees and *they specifically named the Union in the bulletin as the agency to take up grievances with the petitioner.* The Board apparently considers that this was tantamount to the refusal of recognition,[16] but it cannot escape the fact that negotiations were had and an agreement was reached.

In addition to the reasons assigned by the Company in its discussion with the Union, it is easy to see that there are other substantial reasons which might influ-

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15. To this we may add that the petitioner was consistent in its stand; its agreements with other labor organizations, viz., those representing its truck drivers, its carpenters, etc., were not signed contracts (R. 1067; 1079).

16. The Board also cites, as evidence that recognition was refused, the statement of Riley, in his testimony, that he considered the agreement as one between the petitioner and the employees, rather than with the Union, but this is indeed a pointless criticism when Riley's testimony is read. Riley was asked (R. 1081) if he considered the bulletin as an agreement between the Company and its employees, to which he replied in the affirmative. He was then asked "but you don't consider it an agreement between the Canning & Pickle Workers, Local No. 325" to which he replied "no; they have simply negotiated the agreement for the employees." Far from being a statement to be criticized, this seems to be a sound expression of the theory of the National Labor Relations Act, for it clearly looks upon a labor union, not as a thing apart from the employees, but as a representative or agent negotiating in the process of collective bargaining for all the employees.

ence an employer to decline a formal agreement which generally runs for a definite term. It is well known that labor agreements for a definite term tend to produce recurring labor disturbances at their expiration dates. The agreement is generally enforceable against the employer and not enforceable against the union, as men cannot be compelled to work against their will, and if wages rise, the employees drift into other employment, irrespective of the union agreement. The obligations imposed by the agreement were placed only on the Company. There was no covenant imposed upon the Union and no reason for the Union to sign the contract. The Company had similar arrangements with other unions and it was proper for it to desire uniformity regarding these agreements. This position helped to remove the Company from the risk of jurisdictional quarrels between unions, which frequently occur. All of these factors were proper reasons for refusing the form of the contract desired by the Union and if the Act is to be interpreted to require *a particular form* of agreement it will merely place obstacles in the way of the possibility of the parties arriving at an amicable settlement, instead of accomplishing the purposes of the Act.

The opinion of the Circuit Court in this case seems to have accepted the Board's theory that a violation of Section 8(5) may be predicated upon conduct of an employer which the Board interprets as a denial to a union of absolute equality in bargaining position. Thus the Court emphasizes four factors as showing bad faith upon the part of the petitioner: (1) the refusal to enter into a signed agreement; (2) the withholding from the Union of the status of an equal during the negotiations; (3) the revision by Anderson of the draft of the bulletin prepared by the attorneys; and (4) the adoption of dilatory tactics, as manifested by Anderson's refusal to

post the attorneys' draft of the bulletin and his substitution of a revised draft. All of these items, except No. 2, we have already mentioned. As to the alleged refusal to treat the Union as an equal in the course of negotiations, we can only say that we are unable to find in the record any evidence, however slight, of any such attitude on the part of petitioner. The petitioner's negotiators met with the Union's representatives on at least a dozen occasions and even furnished them with a place to meet, as it since has done in dealings with the grievance committee. At all of the meetings the Union was represented by its attorney. In addition, several international officers and organizers of the Union were present from time to time and in the early stages the Union had the assistance of a priest who had no official status with the Union. Not one of these persons—nor any member of the Union's local committee—had any complaint of discourtesy or overbearing conduct.[17] There was some testimony that the petitioner's representatives took a firm position on certain points at issue and particularly on the demand for a 20% increase but if firmness in negotiation is the equivalent of a refusal to bargain, then the employer might as well throw up his hands and enter the negotiations, not as an equal, but as an inferior. When we remember that the Board, in

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17. It is true that Father Rice, who attended some of the earlier conferences, testified that it was his *"impression"* that the Union men "were not being bargained as equals, and that the Company's attitude was best expressed by Mr. Anderson's 'take it or leave.'" (R. 637) However, it is clear that his impression was based upon the fact, as he testified, that he couldn't "remember in the negotiations any point on which the Company yielded." (R. 637) If he had attended all of the meetings and had realized that the petitioner in fact made many substantial concessions, his impressions would have been altered. We may add that his testimony as a whole indicates that he expected the petitioner to yield on almost every point (R. 638).

its administration of the Act, hews to the philosophy that there must always be, between capital and labor, a deep-rooted conflict of interest, it is indeed curious to find it taking such an unrealistic view of the processes of bargaining.

The truth of the matter is that all of these four factors are clearly beside the point. If there have been negotiation and an agreement, no court or administrative agency should have the power to inquire into attitudes and arguments which prevailed during the course of trading. *Perhaps we repeat ourselves, but it is fundamental that, while the course of negotiations may be relevant to establish the obstinacy of an employer who refuses to bargain, it has no place in appraising the conduct of the employer who has dealt and agreed.*

The acceptance by the Circuit Court of the "psychological" argument of the Board is emphasized in the concluding paragraph of its opinion, which reads:

> "Petitioner's refusal to execute a written agreement at the request of the Union may well have left the employees suspicious of its good faith and with a sense of insecurity that does not ordinarily exist when neither party has reasonable ground to doubt the other's good faith. We are of the opinion that the sense of insecurity engendered by petitioner's strange unwillingness to execute a written contract embodying terms that it would have its employees believe it had orally agreed to in good faith, required the Board to exercise the power conferred in § 10(c). There was no abuse of discretion in the order as made. *National Labor Relations Board v. Highland Park Mfg. Co., supra.*"

It may be observed that the Court's use of the word "may" is almost sufficient to show the conjectural character of its conclusion. Moreover, if the record as a whole be consulted it will clearly appear that this anxiety over the Union's "loss of face" is wholly speculative. The Union was a signatory, with the petitioner, to the written agreement which ended the strike. If the Union wanted to boast of its prestige, here was the documentary evidence. Moreover, wage increases, liberal vacation allowances and other improvements in working conditions are the tokens of a union's success and if the Union desired to enhance its reputation for vigor among the employees of the petitioner, the bulletin was just as much available—if not more so—as a signed and sealed agreement. As a matter of fact, as we have indicated (pages 26-27, *supra*), the Union, in its publications, made good use of the bulletin to this end. In the last analysis, the argument of the Board about "dignity" and "equality" amounts to this, that the Board seems to be more interested in aiding the efforts of the Union to organize the employees of the petitioner than it is in providing impartial and realistic administration of the Act. More than this, the Board's willingness to serve the cause of the Union by ordering the petitioner to scrap the agreement which now governs its relations with its employees shows but little concern for the rights of the rank and file which the Act is supposed to protect.

The opinions of the various Circuit Courts of Appeal on the subject of a written agreement may be of interest to this Court. Among these the most logical is the opinion of the Seventh Circuit in *Inland Steel Company v. National Labor Relations Board,* 109 F. (2d) 9 (1940). In that case, the facts were much stronger

in support of the Board's contention, in that the employer merely met with the Union and, taking the position that it was already observing the Union's demands with respect to wages, hours, etc., *refused to make any written memorial or record of the terms of employment.*[18]

The following extracts from the opinion of the Court are powerful arguments in support of our position (pages 23-25):

> "We are unable to agree with the argument that the Act imposes a duty upon an employer applicable only in some cases. We should think that such a construction of the Statute might well endanger its validity. When the concession is made, as it is, that the matter of a signed agreement is dependent upon a request by the employees or their representatives, and may be waived, we think it is clear that the matter becomes a subject of bargaining the same as any other request or demand. *The Statute is barren of any express language requiring a signed agreement and it must be held that no such agreement is required unless we*

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18. The decision in this case may have been influenced by the fact that the Congressional Committee investigating the Board has brought forth proof that the case as a whole was the result of a conspiracy between the Board and the Steel Workers' Organizing Committee to entrap the employer into a refusal to sign an agreement (Preliminary Report of Committee, Dated March 29, 1940). Despite this, and despite the fact that the Court also found that the employer had been denied a fair hearing, the Court's opinion on the subject of the obligation to sign a contract may be accepted as the unqualified view of the Court, by reason of subsequent decisions in which the Seventh Circuit Court has re-stated its opinion. See: *Fort Wayne Corrugated Paper Co. v. National Labor Relations Board*, 111 F. (2d) 869; *The M. H. Ritzwoller Co. v. National Labor Relations Board*, ..... F. (2d) .....; and *Stewart Die Casting Corp. v. National Labor Relations Board*, ..... F. (2d) .....

*are authorized to* read into the term 'collective bargaining' the condition that all agreements, not some, must be reduced to writing.

"* * * Our attention is called to what is designated as the historical development of the collective bargaining process, the function of the written trade agreement as a means of insuring industrial peace, and the legislative history of the Act. On the two former propositions, the argument is predicated largely upon various economic pronouncements including the testimony of two economists of repute who testified in the hearing, one for the petitioner and the other for the respondent. We are dubious of the pertinency of the argument made in this respect. It should be directed to Congress rather than to the courts. * * * It would seem the legislative history of the Act could be better appraised by what was said in Congress when the Act was under consideration. * * *"

* * * * * *

The Circuit Court then refers to various statements of Members of Congress who sponsored the Act (which statements we have already set forth, *supra*, pages 30 and 31), and continues:

"In arguing that we must read into the Act 'signed agreements', respondent argues:

"'* * * Manifestly, Congress could not set out in detail every step required by the duty to bargain in good faith. Of necessity it enacted a general command and left the Board and the courts free to determine in each instance the particular implications of that command. * * *'

"It would be a matter of serious concern to believe that Congress legislates in any such hap-

hazard fashion. It is fair to Congress to conclude that if it had intended to place upon the employer the duty of entering into a written agreement, it would have so provided. This belief is strengthened from the fact that in the amendments to the Merchant-Marine Act of 1936, it provided that the Board shall encourage all maritime employers and employees to exert every reasonable effort 'to make and maintain written agreements concerning rates of pay, hours of employment, rules and working conditions.' 46 U. S. C. A. § 1254."

The opinion of the Second Circuit Court of Appeals, in *Art Metals Construction Company v. National Labor Relations Board,* 110 F. (2d) 148 (1940), is opposed to the decision in the *Inland* case, but on the facts, it is not an authority against the present petitioner. In the *Art Metals Construction Company* case, the Court held that it was an unfair labor practice for an employer to refuse to commit to writing an agreement with the representative of its employees, but it is evident that the ruling is based on the theory that it is unreasonable to expose the terms of an agreement to the hazards of recollection. This clearly appears from the following quotation from the Court's opinion: (page 150)

"* * * They should include whatever is reasonably appropriate to protect it, and no one can dispute that a permanent memorial of any negotiation which results in a bargain, is not only appropriate, but practically necessary, to its preservation; it is hardly necessary to observe that without it the fruits of the privilege are exposed to the sport of fugitive and biased recollection. The purpose of a contract is to define the promised performance, so that when it becomes due, the parties may know the extent to which the promisor is

> bound; and it is the merest casuistry to argue that the promisor's freedom to contract includes the opportunity to put in jeopardy the ascertainment of what he has agreed to do, or indeed whether he has agreed to anything at all. The freedom reserved to the employer is freedom to refuse concessions in working conditions to his employees, and to exact concessions from them; it is not the freedom, once they have in fact agreed upon those conditions, to compromise the value of the whole proceeding, and probably make it nugatory."

In short, the Second Circuit Court has not gone beyond the point of holding that there should be some memorial of the agreement and there is nothing in its opinion to indicate that it subscribes to the *"dignity"* argument which has prevailed in the instant case. The opinion of the Ninth Circuit Court, in *National Labor Relations Board v. Sunshine Mining Company,* 110 F. (2d) 780 (1940), seems to have accepted, without much analysis, the views of the Second Circuit Court as expressed in the *Art Metals Construction Company* case, *supra.*

*National Labor Relations Board v. Highland Park Manufacturing Company,* 110 F. (2d) 632 (1940), decided by the Fourth Circuit Court of Appeals, is also opposed to the doctrine of the *Inland Steel Company* case, *supra,* although distinguishable on its facts from the instant case. It seems quite clear that in the *Highland Park* case the employer's representatives had gone into the conferences with the union, without intending to reach any agreement whatsoever. They made no counter-proposals and preserved an attitude of obstinacy throughout the negotiations. On the subject of an obligation to make a written agreement, the Court declared: (pages 637, 638)

"* * * The act, it is true, does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible; and mere discussion with the representatives of employees, with a fixed resolve on the part of the employer not to enter into any agreement with them, even as to matters as to which there is no disagreement, does not satisfy its provisions.

* * * * * *

"The purpose of the written trade agreement is, not primarily to reduce to writing settlements of past differences, but to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted. Wages may be fixed by such agreements and specific matters may be provided for; but the thing of importance is that the agreement sets up a *modus vivendi*, under which employer and employee are to carry on. It may be drawn so as to be binding only so long as both parties continue to give their assent to it; but the mere fact that it provides a framework within which the process of collective bargaining may be carried on is of incalculable value in removing the causes of industrial strife. If reason and not force is to have sway in industrial relationships, such agreements should be welcomed by capital as well as by labor. They not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer."

It is clear from the foregoing quotations that the Fourth Circuit has likewise proceeded on the theory that there should be some memorial of the Agreement, as is further evidenced by the Court's subsequent acceptance of the opinion of Judge Hand in the *Art Metals Construction Company* case, *supra.*

Other decisions from the Circuit Courts might be cited, but we believe that the foregoing are representative of the best opinions. We concede that there is practical persuasiveness behind the argument that there should be some written record of labor agreements, although we do not believe that the Act itself can be properly construed as requiring more than recognition of, and negotiation with, the representative of the employee's choice. But there is a vast difference between requiring a written memorial and the action which the Board has taken in the instant case. Where the Board goes behind an agreement which has been reached and committed to writing, for the purpose of exploring the attitude and generosity of the employer and then condemns the employer, because he has not accorded sufficient respect to the Union, the very structure of the Act is perverted.

The construction which the Board seeks to place upon the Act will surely expose its provisions to the taint of constitutional invalidity, for it is the equivalent of an interpretation that the Act requires *one party* to the negotiations *to make an agreement against his will.* We need not cite the many decisions of this Court which hold that freedom of contract may not be abridged by statute or the rulings of an administrative agency. The opinion of the Court, in *Charles Wolff Packing Company v. Court of Industrial Relations,* 267 U. S. 552 (1925), seems to have determined the point. In that case, the Court struck down as invalid a compulsory arbitration

statute of the State of Kansas which authorized an administrative agency to fix terms of employment between employers and employees. In so holding, the Court declared: (page 569)

> "The system of compulsory arbitration which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment * * *."

It may be observed that the Kansas statute at least had the virtue of imposing agreements on both parties to the transaction, whereas the Board's practice has the effect of forcing *only* the employer to agree. As a matter of fact, even if it so desired, the Board could not compel employees or their representatives to enter into collective bargaining agreements, for Section 8(5) of the Act is directed to the employer alone and the Act expressly reserves to employees the right to strike. It is perhaps a clue to the arbitrariness of the Board's Order, and a most influential factor in the construction to be placed upon the Act, that *in this very case the Order upon the petitioner to sign a contract is made contingent, not upon the petitioner's desires or upon the requirements of the law, but upon the wishes of the Union.* Thus, the Order says, in terms, that the petitioner must sign an agreement "if requested to do so" by the Union.

Another point on the subject of the constitutional validity of the Board's construction of the Act is worthy of observation. In the series of opinions,[19] in which this Court upheld the validity of the National Labor Relations Act, it justified the Act as a regulation of commerce on the ground that it was designed to eliminate obstructions which might interrupt the course of commerce. Thus, in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, Chief Justice Hughes declared: (pages 36, 37)

> "The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*Mobile County v. Kimball*, 102 U. S. 691, 696, 697); 'to foster, protect, control and restrain.' *Second Employers' Liability Cases*, *supra*, p. 47. See *Texas & N. O. R. Co. v. Railway Clerks*, *supra*. That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' *Second Employers' Liability Cases*, p. 51; *Schechter Corporation v. United States*, *supra*. Although ac-

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19. *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937); *Washington, Virginia and Maryland Coach Company v. National Labor Relations Board*, 301 U. S. 142 (1937); *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1937); *National Labor Relations Board v. Fruehauf Trailer Company*, 301 U. S. 49 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Company, Inc.*, 301 U. S. 58 (1937).

> tivities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corporation v. United States, supra* * * *."

It appears from the opinion, that the counsel for the employer had argued that the National Labor Relations Act was invalid because it was in practical effect *a labor statute* and *not a true regulation of commerce.* This Court, in the case cited and in its companion cases, refused to accept this contention and upheld the Act as a *bona fide* effort on the part of Congress to eliminate from the stream of commerce obstructions which could be traced to unfair labor practices on the part of employers. We do not believe that this Court meant to sanction the view that the Act was a comprehensive labor statute, authorizing a Federal agency to impose terms of employment upon employers and employees engaged in local activities. If this had not been the case, the Court would not have been so careful to preserve the precedent of *Schechter Corporation v. United States,* 295 U. S. 495 (1935), and similar cases.

As Chief Justice Hughes declared in the *Jones & Laughlin Steel Corporation* case, "the cardinal principle of statutory construction is to save and not to destroy." If the construction contended for by the Board is proper, it would surely destroy the constitutional validity of Section 8(5) of the Act.

## II.

## The Board's Conclusions That the Petitioner Was Guilty of Unfair Labor Practices Within the Definition of Sections 8(1) and 8(2) of the Act Are Erroneous, in That They Are Based Upon Acts of Individual Employees Which the Petitioner Neither Authorized Nor Ratified, But Promptly Repudiated.

If it is assumed that the petitioner did not violate Section 8(5) of the Act, as we have contended, then the Board's conclusions that the petitioner was guilty of unfair labor practices, within the meaning of Sections 8(1) and 8(2) of the Act, can be sustained on only one hypothesis, viz., that the petitioner should be held responsible for the activities and opinions of certain supervisory employees whose attitude might be construed as having been favorable to the Association and hostile to the Union. This single issue is pointed out in the somewhat unusual conclusion of the Court below that the petitioner "violated §§ 7,[20] 8(1) and 8(2) of the Act, *though there may have been neither express authorization nor ratification.*" In short, the opinion of the Circuit Court is based upon a theory of "liability without fault," an assumption that an employer may be held to have violated the Act, without willing or intending a violation. In order to demonstrate that this strange proposition is the sole issue before the Court, a somewhat complete analysis of the facts is essential.

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20. In our discussion of this issue, Section 7 of the Act will be disregarded because it merely states the general principle which is sought to be protected by the specific prohibitions of Section 8. The authority of the Board, under Section 10, is confined to the prevention and correction of the unfair labor practices proscribed by Section 8. It follows that unless Section 8 has been violated, the Board has no jurisdiction.

In the interests of clarity, we shall discuss separately the facts relating to the alleged violations of Sections 8(1) and 8(2), but there are certain preliminary facts which bear upon both situations.

### (a) *Preliminary Facts*

The petitioner is an established food packing enterprise. It maintains and operates many plants, receiving stations, warehouses and other facilities throughout the United States and in foreign countries (Board's Exhibit "2", R. 19-25; 239). Its principal plant and executive offices are located in Pittsburgh where the organization had its origin about 70 years ago (R. 1050; Board's Exhibit "4", R. 26 at 29; 241). Throughout its existence, the petitioner's relations with its employees have been most satisfactory; its labor policies have been both generous and personal. Among the benefits provided by the petitioner to employees have been pensions, hospitalization and insurance. In connection with its Pittsburgh plant, it has maintained an auditorium, in which various forms of entertainment have been furnished to the employees, without charge (Board's Exhibit "4"; R. 26 at 34, 35; 241). It may justly be said that throughout its history, the petitioner's employees have been accustomed to associate and deal with their supervisors and with the management on an intimate basis. Until 1937, the petitioner had had no experience with any organizational activities among its employees (Decision and Order of the Board, R. 201) or with the emotional stresses which such activities usually generate. Its supervisory force had received no instruction as to the position which should be taken with respect to the organizational activities of the employees, because until that time there was no reason for issuing such instructions. This fact has been neglected by the Board and by the Circuit Court

but on the issue of responsibility it has a most important bearing.

The Pittsburgh plant consists of many buildings, each of which is in turn divided into many departments (Board's Exhibit "4"; R. 26 at 30; 241). In these departments are performed the many processes which are required in preparing, packaging and shipping the petitioner's numerous food products. At Pittsburgh, the petitioner normally employs over 2,000 persons, many of whom are female employees (R. 752). Its supervisory force throughout the various departments numbers about 250.

There is no dispute in the evidence as to the status and authority of petitioner's superintendents, foremen, foreladies, assistant foremen and assistant foreladies, it being established that they are salaried workers, with powers of supervision in their respective departments and having a somewhat limited privilege of recommending the employment and discharge of the workers under them (R. 760-762).

There is also a classification of *hourly* employees, called "group leaders," who are not regarded as supervisors by the management (R. 753, 754), but for whose acts the Board holds the petitioner accountable. These employees work with the other non-supervisory employees but because of their superior training, ability or experience they are frequently entrusted by their foremen with the duty of laying out and directing the small groups of men or women who work with them (R. 754, 755). They do not have the supervisory authority of foremen and as a consequence there is a serious conflict in the evidence on the question of management's responsibility for their extraneous or collateral activities and statements. This question, however, is not important

to the immediate issue, except that it is appropriate to observe that the Board, in fixing the responsibility of the petitioner, has to a large extent relied upon the alleged activities of these group leaders, overlooking the fact that these men come into such intimate, personal contact with their companions in work that it would require Herculean efforts to observe and control their thoughts and beliefs. In this connection, it may be pointed out that both the Union and the Association admit these persons to membership and that they were permitted to take part in the election which has been previously mentioned (Board's Exhibit "16"; R. 48 at 49; 566; R. 475; 284).

In the early part of 1937, and particularly in April and May of that year, the Association and the Union undertook intensive and sometimes heated campaigns to enlist members among the employees. The coincidence of the two organization drives led inevitably to hostility and bitterness between the adherents of each group, which in turn bred confusion and disunion among the personnel as a whole (R. 730, 731). Public meetings were being held by each union and the employees were being constantly bombarded by the inducements and threats of each group. As we have indicated, the petitioner had never been faced with a situation such as this and its supervisory force found itself in the midst of the turmoil and confusion without any guidance as to the attitude which it should take.

Against this essential background, we proceed to consider the activities which the Board has characterized as establishing violations of Sections 8(1) and 8(2) of the Act.

(b) *Activities Bearing Upon the Alleged Violation of Section 8(1) of the Act*

The Board has concluded that the petitioner has restrained and interfered with its employees in the exercise of their rights under the Act in violation of the provisions of Section 8(1). The Board consistently holds that violations of Section 8(2) and Section 8(5) are *ipso facto* unfair labor practices within the meaning of Section 8(1), but, as we have indicated, Sections 8(2) and 8(5) are being separately dealt with in this argument and need not be mentioned here. However, the Board also points to certain transactions as of themselves showing a violation of Section 8(1) and it is these activities which will be analyzed in the following discussion.

Let us say at the outset that this *is not a case where the employer has indulged in actual or threatened discrimination.* Evidence of discriminatory discharges or other unfair treatment of employees, which may seem to be commonplace in many labor cases, is not found in this case. The only proof of interference or restraint consists of testimony that a few supervisory employees were guilty of statements or expressions of opinion which might be deemed hostile to the Union. The Board's evidence on this point may be summarized as follows: (1) That Heinrich, plant superintendent, in the course of separate conversations on various subjects with five employees, made remarks which disparaged the Union; (2) that Hayes, a general foreman, made similar remarks in a casual conversation with an employee; and (3) that four foremen (Locke, Brooks, Schirer and Fisher) and a sub-foreman (Vajentic) expressed opinions unfavorable to the Union to different employees in their respective departments. Heinrich specifically denied making the remarks attributed to

him (which is confirmed by his subsequent conduct, as hereinafter indicated) and most of the other alleged conversations or remarks were denied or explained by the accused persons. We recognize that the findings of the Board on the subjects of conflicting evidence and credibility are not to be attacked in this Court but we mention these denials and explanations to indicate the trivial character of the conduct of which the Board has complained.

The foregoing summary of the Board's testimony leads to certain important observations. In the *first* place, apart from Heinrich, the persons charged with anti-Union opinions are merely minor supervisory employees, who are in constant communication with their fellow employees and who may be expected to have frequent conversations with them, inside and outside the plant, on a great variety of subjects. In the *second* place, there is absolutely *no proof* that any executive or officer of the petitioner, who could be said to be responsible for its labor policies, authorized the statements or *had any knowledge that they were being made.* In the *third* place, the transactions of which the Board complains are *extraneous* remarks involving *merely a half dozen supervisory employees out of a force of almost 250,* while the employees to whom the statements are supposed to have been made (and who apparently were not influenced by them in the slightest degree) number about *a dozen* out of *2,000.* In the *fourth* place, and this is most important, all of these remarks and statements are supposed to have been made (according to the witnesses who complained of them) in the early stages of the Union's organization drive, at which time, as we have pointed out, the petitioner's supervisory employees were being faced with the confusion and strife occasioned by the conflicting claims of the two unions.

Even if we ignore the constitutional principle that the persons who are charged with disparaging the Union had a right to hold and pronounce these views, how can responsibility for their utterance be laid upon the petitioner? Not only is there no proof that the petitioner authorized these statements; there is nothing in the scope of its supervisors' authority which would warrant the belief that they had the power to commit their employer by their remarks on subjects extraneous to their work. On the contrary, the record conclusively demonstrates that the petitioner was plainly opposed to any unneutral conduct on the part of its supervisors (R. 730-733; 1029-1032; Respondent's Exhibit "3", R. 78-80; 733).

The record shows that on May 1, 1937 (about a month after the Union had begun its drive and three weeks before the strike) an international officer of the Union (Call) went to see Riley, an officer and director in active charge of the Pittsburgh plant, to register a complaint of "some interference with the employees' organizing." Riley asked him if he could mention a specific instance, to which he said "no", adding that he thought the "trouble" had been caused by "the foremen" (R. 1029). *Prior* to this complaint, Heinrich, the petitioner's superintendent, *had issued individual instructions to the foremen and foreladies* that they should take no part in organization activities in the plant, that they should give no advice to employees and that they should remain completely silent on the subject (R. 731). However, as a result of Call's *general* complaint, Heinrich, at Riley's direction, called a general meeting of the foremen and foreladies at which he repeated his previous instructions that they should preserve a neutral attitude in the organization campaigns (R. 731; 1031).

On May 21, 1937, Kracik, an international officer of the Union, and Tasker, its business agent, again ap-

proached Riley with a complaint of interference but on this occasion they said they were able to produce a specific instance in support of their charge (R. 1030). Riley advised them that if their complaint was found to be justified, the condition would be corrected. He investigated the complaint and called a meeting of the supervisory force for the same day. Riley himself spoke to the meeting and declared that the foremen and foreladies would be required to adhere to the policy of neutrality ordered by Heinrich (R. 1030, 1031). As Riley testified, he addressed the meeting for about 15 minutes, giving the background of the labor movement and telling those present, viz., the supervisory force, that they "had no place in this picture at all; they weren't to concern themselves with it" (R. 1031). Afterwards Riley advised the Union officials of his instructions and they stated that they were entirely satisfied (R. 1031, 1032). This appears, not only from the testimony of Riley, but also from the declarations of *a member of the Union's bargaining committee,* who testified *for the Board* as follows:

"Q. And you know that the Union officials went to Mr. Riley and complained that some of these straw bosses and some of these foremen were helping the association, don't you?

"A. Yes.

"Q. And Mr. Riley called a meeting of all the foremen and cautioned them against that, didn't he?

"A. That's right.

"Q. And your union expressed itself as entirely satisfied with what he had done, didn't they?

"A. Exactly" (R. 476).

The Union did not then or at any other time request any further action on the part of petitioner's management.

The Board seeks to cast a cloud upon the sincerity of these three separate sets of instructions, by inferring

that Heinrich could not have been sincere in issuing his orders, since according to the Board's belief, he had indulged in remarks disparaging to the Union. In addition to his constitutional right of free speech there are three conclusive answers in the record to this argument. In the *first* place, so far as Heinrich himself is concerned, it appears that the remarks attributed to him are said to have occurred before he issued the instructions which Riley ordered, so that his prior conduct could afford no grounds for doubting the sincerity of the subsequent instructions which he was required to deliver. In the *second* place, any question of Heinrich's sincerity could have no bearing upon the propriety of the instructions issued by Riley himself. Heinrich was merely a plant superintendent, while Riley was his superior, a director of the petitioner, in charge of its Pittsburgh plant. Riley's orders to the foremen and foreladies had all the force and authority of the petitioner's policymaking executives. In the *third* place, this contention overlooks the fact that of all the complaints which were made by Board witnesses on the subject of interference, *not one is claimed to have occurred after the day on which Riley made his address to the supervisory force.*

During the strike, many acts of violence and intimidation were committed and the bitterness and conflict which characterized the strike persisted after it was terminated (R. 733-735; 736, 737; 1067). Realizing that these conditions might tempt the supervisory force to take sides in the controversy, the officials of the Company, on their own initiative and without any request from the Union, decided to issue further instructions. Howard Heinz, the President of the Company, called a meeting of the supervisory staff at which he informed them in no uncertain terms that it was their responsibility to see that all employees were treated fairly and equally; that there should be no discrimination of any

kind and that the foremen and foreladies should have nothing whatsoever to do with the activities of the employees, except to see that the work was done (R. 732). Shortly after this, Heinrich addressed the staff along the same lines (R. 732, 733) and followed up the two addresses *with an official written bulletin to all supervisory employees* (Respondent's Exhibit "3"; R. 78-80; 733), in which it was said:

"We have had two meetings recently, entirely devoted to the subject of your relationship with the employees under your direction, and have tried to make it very clear to you that you must give considerable thought to your relationship with these employees.

"Every employee must be treated the same as any other employee, and while we have always operated on this principle, special stress must be laid on this point at this time, due to the recent disturbance in our industrial relationship, which has resulted in two groups of our employees becoming antagonistic to each other.

* * * * * * *

"* * * if you do have a sympathetic understanding of the condition and handle it in the right manner, you can do much to bring the people together in happy relationship one with the other and also the Management. *Only by being honestly impartial and disinterested can you hope to bring this about and we again urge you to direct your efforts to this end.*

* * * * * * *

"These statements apply to relationship with all our employees, as it is our aim and should be yours to see that every employee gets a square deal regardless of which group he has affiliated himself with.

"Complaints have reached us from the members of the two groups in our factory about occurrences which we feel should not give rise to complaint if the person involved had understood why certain things were done.

"The National Labor Relations Board called our attention on Saturday (to) two more complaints that, while they were rather trivial, did indicate just how careful you must be in talking to the employees, no matter how friendly you may feel toward them. The complaints had to do with statements made to our employees by two foremen, which statements were resented by the employees to the extent that they reported them to the Labor Board. Investigation indicates that both statements were made in a kidding manner without the foremen being aware that any resentment would be taken to the conversation, but it indicates clearly that all kidding and joking with employees under your direction must stop, as they seem to get upset now at things you say to them that ordinarily in the past would have been laughed at.

*"We must insist that you do not talk to employees, except about their work, and you must treat them all just as fairly as it is humanly possible to do."* (Italics supplied)

We submit that the foregoing record clearly indicates that the petitioner's supervisory officials endeavored, with the utmost sincerity, to prevent any conduct on the part of foremen or foreladies which could be construed as a violation of either Section 8(1) or Section 8(2) of the Act. It proves, not only that the petitioner did not in any manner authorize or acquiesce in the conduct which has been charged to some of its foremen, but also that it took active steps to prevent any repetition. If the supervisory force had indulged in interference and

coercion on a scale so wide that it would follow, as a necessary inference, that the petitioner had either authorized it or acquiesced in it, the situation might be different. In the instant case, however, the activities complained of were so infrequent and isolated (as well as of doubtful significance), that there can be no legitimate inference that they were manifestations of any policy on the part of the petitioner.

(c) *Activities Bearing Upon the Alleged Violation of Section 8(2) of the Act.*

The Board has concluded that the petitioner violated Section 8(2) of the Act by dominating and interfering with the formation and administration of the Association and, upon the basis of such conclusion, the Board has directed the petitioner (1) to cease and desist from interference with the Association and (2) to withdraw recognition from the Association as the representative of its employees and to disestablish the Association as such representative.

We may observe at the outset that the second part of this order, that is, the direction to withdraw recognition and to disestablish the Association seems to be utterly beyond the authority of the Board in the instant case, *because there is no showing that the petitioner has been or is in any manner recognizing the Association as the representative of its employees.* On the contrary, the record demonstrates that while the petitioner may have accorded recognition to the Association for a few days during the strike, this recognition and petitioner's agreement with the Association were withdrawn and cancelled before the end of the strike by virtue of the agreement to submit the question of representation and recognition to a secret election sponsored by the Board (Board's Exhibit "16", R. 48, 49; 566). Moreover, the

election resulted in a victory for the Union and the petitioner immediately accorded recognition to the Union as the exclusive representative of its employees, entering into an agreement with it on that basis. This recognition and the agreement have continued in effect since July, 1937. It is patent that the continued recognition of the Union is the equivalent of non-recognition of the Association for under the law it is impossible for both organizations to act as the representative of petitioner's employees in the same unit. The Board has nevertheless sought to uphold this portion of its Order upon the theory that this Court has sanctioned the principle that an order to withdraw recognition and disestablish a union does not lose its force merely because it has become moot. However, this ruling has been applied by this Court in cases where the withdrawal of recognition was accomplished by a simple statement of the employer, leading this Court to hold that a mere withdrawal by the employer cannot relieve the effect of prior domination and therefore will not operate as an absolution. The vital distinction in this case is *that the original recognition was vitiated and set aside by an election, in which the employees were permitted to express their free choice and in which any prior recognition of one union by the employer could have had no influence whatsoever.* It follows, we submit, that this branch of the Order is clearly an abuse of the Board's authority. While this particular issue may not be precisely before the Court, it is mentioned at this point, because it shows the weakness of the Circuit Court's suggestion that the petitioner should have posted bulletins advising the employees of its neutrality.

On the subject of the petitioner's alleged interference with the formation and administration of the Association, let us say at the outset that the evidence upon which the Board has based its finding is confined to an

extremely narrow field of activity. The petitioner did not, in any manner, inspire or stimulate the formation of the Association; on the contrary, the only evidence in the record is that the Association was initiated by several employees who were, for their own reasons, hostile to the Union (R. 899-902; 981, 982; 989, 990; 994, 995; 1000-1002). Furthermore, the petitioner did not contribute any financial or other tangible support to the Association, either in its formation or in its administration (R. 902; 1047). Moreover, there is not herein a state of facts, which has appeared in many cases before this Court, in which representatives of the employer took part in the internal management and administration of the Association. On the contrary, the Association elected its own officers (R. 940), arranged its own government (R. 939) and retained its own attorney to handle the details of administration and to represent it in its negotiations (R. 904; 927-931).

It is fair to say that the evidence which is supposed to sustain the finding of interference and domination consists exclusively of the following items: (1) that during the early stages of the Association's organization drive, a petition pledging support of the Association was circulated in some of the departments of the petitioner's Pittsburgh plant, during working hours, with the seeming acquiescence of the supervisory force in such departments; (2) that a few so-called "group leaders" took part in the circulation of the petition and (3) that four or five foremen expressed to employees in their departments opinions which might be construed as favorable to the Association.[21]

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21. On this point, the Board relies heavily upon a so-called speech of Locke, foreman of the "Bean Department" to a group of approximately 30 employees. An Association petition which had been signed by several of the men had been stolen from an employee in Locke's department and a complaint was made to Locke. Locke called the

A very substantial part of the Board's testimony with respect to these three lines of proof was denied or a reasonable explanation provided. In addition, other facts were brought out which deprived the Board's proof of the substantial character required to justify its findings. For example, it appeared that the Union had also solicited members on the petitioner's property and during working hours.[22] Moreover, so far as the activities of the group leaders are concerned, it is most significant that they were eligible to membership in both organizations and took part in the Board election, so that having the right to join either union, the petitioner surely should not be held responsible for their activities in support of either organization.

We believe that we are entitled to make and emphasize the same observations with respect to these items of proof as we did with respect to the 8(1) issue. Again, the proof of interference by foremen is indeed trivial when it is considered that out of 250 supervisory em-

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men in the department together and read a statement (Respondent's Exhibit "4", R. 80, 81; 786) in which he said that a complaint had been made that an Association petition had been stolen and that this was wrong, because the men had the right to express their sentiments in favor of the Association, if they so desired. He also stated that any person in the department had the right to join either the Association or the Union and that "whatever your wishes are they will be protected." He closed his speech by stating that since the petition had been stolen, the men who had signed it would be given the opportunity to sign another copy of the petition, if they so desired. He closed his speech with the remark "if there are any who want to join the A. F. of L., I am sure there are men here who will take care of them and see that they get signed up." It may be noted that the Board believes he should have gotten an A. F. of L. organizer to take signatures, which is patently a *non-sequitur* since none of their records had been stolen.

22. The Board says this is negligible in comparison with similar conduct of the Association (Decision and Order, R. 198 at 211). The obvious explanation is that the Board was seeking to prove what the Association had done and deemed the like tactics of the Union wholly irrelevant.

ployees, scarcely a dozen are said to have been involved in questionable activities. Again, practically all of the proof is concerned with mere expressions of opinion on the part of supervisory employees, who were in intimate association with the men in their departments. Again, there is no evidence that any responsible official or executive of the petitioner took part in any of these activities or expressions of opinion or had any reason to suspect that they had occurred. Again, it is clear from the record that these activities and expressions of opinion occurred in the early states of the organization drives, in the midst of the confusion and hostility engendered by the conflicting claims of the two organizations.

The facts which we have recited in the preceding sub-division of this brief (*supra*, pp. 60, 61), relating to the actions taken by the management to forestall any improper conduct or remarks on the part of the supervisory force, are equally relevant here, for the instructions issued to foremen and foreladies not only required them to refrain from any hostility to the Union, but also prohibited any favoritism, in word or act, towards either organization. To this we may add that there is affirmative evidence that Riley's instructions were obeyed, in the fact that efforts of Association organizers to pass petitions in certain departments, after the date of the instructions, were stopped (R. 903; 827; 831).

(d) *The Legal Principles Involved.*

Although the Act is said to be remedial, rather than punitive, in character, a Cease and Desist Order is by no means an idle gesture. It brands the employer, in the eyes of his employees and of the public, as a violator of the laws of the United States. If supplemented by a direction to post notices, as in the instant case, it has the effect of requiring the employer to make a public

statement of his supposed guilt. In addition to these adverse effects on the prestige and standing of the employer, it also may result in serious material losses. For example, in the instant case, it appears that the employer sells its products to the general public and any loss of good-will with the public must have a prejudicial effect upon its business and its profits. To this we may add that the report of the Congressional Committee which investigated the Labor Board establishes the fact that the Board has obtained extra-judicial enforcement of its orders by inducing governmental and business agencies to boycott employers who have run afoul of the Board (Preliminary Report of Committee, dated March 29, 1940). Within the last few weeks, the Attorney General of the United States has made public an opinion to the Defense Commission that findings of the Board as to violations of the Act are binding upon other agencies of the Executive Branch of the Government. No doubt this will have some influence on the letting of Government contracts.

These consequences of a Cease and Desist Order are mentioned for the purpose of showing that the question of the employer's responsibility in a particular case is by no means a trivial issue.[23] Moreover, there is a principle of justice and morality at stake. So far as we know, under our system of government no man has ever been convicted of a crime upon the basis of the acts of an agent who had neither express nor implied authority to represent him. Even civil consequences are not, under ordinary principles of agency, imposed upon a person by virtue of the conduct of another, unless it appears that such conduct was either authorized or ratified. We do

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23. Perhaps we misinterpret the attitude of some of the Circuit Courts, but there seems to be, on occasion, a judicial inclination to give the Board the benefit of the doubt merely because, in the Court's eyes, the Cease and Desist Order is merely an academic restraint of past improprieties.

not mean to contend that express authority is essential; we do insist that, in its absence, there must be some substitute form of authority or ratification. *There is not a shred of evidence in this case that the petitioner's employees who were charged with improper conduct had any prior authority from the petitioner, either express or implied, to engage in such tactics.* This defect of proof of responsibility might not have been fatal if there had been evidence of ratification or of knowledge followed by acquiescence, but it also appears from this record that there is no such evidence. *On the contrary, there is distinct proof that knowledge, acquired after the event, was followed by express and unequivocal repudiation.*[24]

The authority of an agent is necessarily limited by the content and scope of his position. The petitioner's foremen and foreladies have authority to supervise and direct the activities of their co-workers, as well as a limited and special power to recommend the employment and discharge of employees. However, when it comes to

24. It may be urged (and perhaps this is the theory of the Circuit Court) that "apparent authority" is sufficient, viz., that if some of the employees *believed* that their supervisors were representing the petitioner in expressing their opinions, the petitioner itself could be held accountable. Any such argument, while superficially plausible, is clearly without merit. The doctrine of apparent authority assumes the absence of actual authority; it is based on a theory similar to estoppel, that is, that a person, who clothes another with the external *indicia* of authority, is bound by his representations. This theory is obviously inapplicable here, because there is no proof that the petitioner represented that its supervisors had authority to speak on the subject of labor policies. Moreover, the doctrine of apparent agency necessarily confines its application to situations in which "private rights" are being enforced; it is never sufficient to convict a person of a public crime. As we have pointed out (*supra*, p. 39) the Act is designed to protect the public interest, not to enforce the rights of individuals. From the standpoint of public interest, the issue in this case is: "has petitioner violated a statute of the United States?" The beliefs and impressions of private persons are of no consequence and cannot substitute for actual responsibility.

expressing the views and attitude of the management on the subject of labor relations, it is apparent that the foremen are "doing" agents, and not "talking" agents. This appears not only from the essential nature of their employment, but also from the circumstances of the charges which have been made against this petitioner. It may not be a difficult task for an employer to prevent, or at least to correct, overt acts of discrimination committed by his supervisory force, but it is obviously impossible to expect him to police the thoughts, opinions and statements of a large and scattered supervisory force.

If we assume that the principle of freedom of expression is of no consequence, we are prepared to admit that there are situations in which an employer may be held accountable for the remarks of his subordinates. For example, if *several* supervisors *habitually* indulge in improper remarks, without any correction by the employer, it may be inferred that the speakers were expressing the employer's policies. It may also be true that if an employer *knows* that his supervisors are engaging in coercive tactics and refuses to undertake to prevent repetition, he may be charged with acquiescence. However, where it appears that the occasions of complaint were casual and the employer *repeatedly* issued firm and unequivocal instructions that an attitude of strict impartiality *must* be preserved, it is a monstrous thing to saddle him with responsibility for the extraneous opinions and acts of a few employees, which he never willed nor approved.

The Board's decision in this case does not try to meet this fundamental issue of responsibility. In the proposed decision, *the Board did not even mention any of the instructions which had been issued by the petitioner's management,* or the incident which we have

described, in which the Union expressed its satisfaction with the instructions which had been issued by Riley on its complaint. The petitioner excepted to the failure of the Board to find the facts which we have outlined, and in its final Decision, the Board was driven to plain evasion to avoid the issue. Thus, the Board makes the following argument on the point: (R. 210, 211)

> "The record shows that at some date prior to the strike, Heinrich instructed the foremen and foreladies that they were not to take part in any of the Union activities of the employees and that they should practice no discrimination between employees belonging to one or the other group. These instructions were apparently given at the request of Riley, a director of the respondent. Substantially the same instructions were given to the foremen and foreladies at two or three different times after the strike by various supervisors or officials of the respondent. It is apparent from the facts set forth in this decision that the respondent's supervisory staff failed to follow the instructions given during the period prior to the strike if, in fact, Heinrich intended them to be followed, which seems doubtful in view of Heinrich's own participation in such activities. The instructions given after the strike, even if followed, came after the anti-union statements and acts of the supervisory staff which are complained of, had been consummated. Under these circumstances, the respondent is not relieved from liability for the acts of supervisory employees as stated above, by showing that such instructions were given."

It is very significant that this equivocal statement studiously ignores the most fundamental facts on the point. It fails to state that Heinrich isued such instructions on *two* occasions, the second being the general

meeting which he called at the request of Riley, after the first (very general) complaint of the Union. Secondly, it evades the admitted fact, established not merely by petitioner's witnesses, but also by Board's witnesses, *that Riley, on a third occasion, prior to the strike, issued similar instructions to the supervisors, at the request of the Union, and subsequently received from the Union a statement that it was satisfied with his action.* In the third place, it attempts to conceal *the most important fact that there was no testimony of any improper conduct occurring after Riley's instruction,* which, as we have indicated, was issued several days *before the strike* was called.

The Circuit Court apparently appreciated the paltry character of the Board's argument on this point, for it has used a different reason to justify the order of the Board. Thus, the Circuit Court had this to say: (R. 1146, 1147)

> "Petitioner also contends that, even if its supervisory employees did engage in the aforesaid activities, there is no evidence that it expressly authorized or ratified those acts; on the contrary, when they were brought to its attention, it claims that all foremen were instructed to remain neutral and not discriminate against any employee because of union activities. But there was no evidence that petitioner directed any supervisory employee to communicate its alleged neutrality to the employees. If petitioner had really wanted its employees to know that they might with safety join whichever union they desired, the bulletin boards were the obvious and, because direct, the most effective means of assuring them of its impartiality. There was abundant evidence that the ordinary employees feared the disfavor of those from whom

they were accustomed to taking orders.[25] Since they were justified in believing that these supervisory employees were acting as petitioner's representatives, petitioner is responsible for what they did."

There are many answers to the hypothetical argument of the Court that the petitioner should have posted bulletins advising the employees that they were free to join any organization which they might select. In the *first* place, Riley's instructions (and his bore the unquestionable stamp of authority) were issued *at the request of the Union and Riley reported that fact back to the Union, so that it may be justly assumed that the Union advised its membership of the action which had been taken.* In the *second* place, any possible coercive effect (of which there is no proof) of statements and expressions of opinion by the supervisory force must have been dissipated by the agreement for an election which petitioner entered into with the Union and by the election, in which each employee had an opportunity to express, with the utmost freedom, his impartial choice. In the *third* place, after the election had been won by the Union, the Company posted the bulletin agreement, hereinbefore described, in which the Company recognized the Union as the representative of its employees, thereby unequivocally advising *all* the employees that the Company was prepared to accept the Union as the collective bargaining agent for its employees. Finally, it is a piece of injustice to condemn the employer for failing, *on its own initiative*, to issue

25. This statement should be accorded the respect which is due to the opinion of a court as sound as the Sixth Circuit Court of Appeals, but we are obliged to state that the most diligent examination of the record does not reveal any evidence to support this remark. On the contrary, an examination of the testimony of Board witnesses who charged petitioner's supervisors with improper remarks will show that they were not only uncoerced, they were militant and defiant.

bulletins to the employees, *when it had repeatedly issued detailed instructions to the supervisory force.* If the Union had asked the petitioner to post such bulletins, there is no reason to believe that the petitioner would have refused, because it appears that on two ocasions, at the request of the Union, and then again on its own initiative, the petitioner issued oral and written instructions to the supervisory force.

A Cease and Desist Order is in many respects the equivalent of an injunction. Its purposes under the Act are supposed to be both remedial and preventive. In its remedial aspect, such an order is designed to remove from the employee's mind any vestiges of employer restraint and domination. In its preventive aspect, it is designed to forestall any repetition of coercive tactics. Just as an injunction will not be issued in equity unless (1) there is a clear case for relief and (2) a convincing need of restraint, a Cease and Desist Order should not be lightly entered.[26] In this case, there is no evidence that any such remedial effect is needed, and on the contrary, the results of the election conclusively demonstrate that any opinions and remarks of the supervisory force must have had little or no persuasive effect. In like manner, its preventive purpose need not be served here, for the record conclusivly shows that the petitioner took steps, *long before the complaint herein was issued,* to prevent any repetition of the tactics which are now said to be unlawful. Moreover, these preventive measures were undertaken in absolute good faith, for

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26. The analogy between an injunction and a Cease and Desist Order may be extended beyond this point. An equity court will not usually grant a restraining injunction on the basis of isolated occasions of wrong-doing, nor will it exercise this extraordinary remedy unless the situation is such that serious harm will result from the failure to grant relief. A "cease and desist" order has all the inhibitory effects of an injunction, and the same sanction behind it, that is, proceedings for contempt.

they antedated the strike by several days and Riley's orders, it appears, were issued as soon as the Union complained to him.

There are decisions of this Court and of the Circuit Courts which seem to be persuasive on the point of responsibility. Thus, in *National Labor Relations Board v. Sands Manufacturing Company,* 306 U. S. 332 (1939), this Court refused to uphold a ruling of the Board that certain employees had been discharged by reason of their exercise of their rights under the Act, in violation of Section 8(3) of the Act. To support its conclusion of discrimination, the Board relied upon testimony concerning alleged statements of a superintendent and of a shipping clerk. With respect to these statements, the Court said (page 342):

> "Neither of the men who are quoted held such a position that his statements are evidence of the Company's policy * * *."

The Board may make the evasive argument here, as it did in the Court below, that *National Labor Relations Board v. Sands Manufacturing Company,* 306 U. S. 332 (1939), does not support our position because it "has nothing to do with an employer's responsibility for coercive activities engaged in by supervisors." The Board seems to forget that in that case the complaint alleged that the discharge involved constituted a violation of Section 8(1), which prohibits interference, restraint and *coercion,* as well as of Section 8(3). In any event, the principle applied there is applicable here. This Court held that, because of the positions the employees held, they could not bind their employer by their statements; *i. e.*, their remarks did not establish the employer's labor policy. It follows that employees similarly situated cannot bind petitioner by their sta ments; *i. e.*, their remarks are not petitioner's, and it is not responsible

for them. Our view of the effect of the *Sands Manufacturing Company* case, *supra*, is supported by the fact that at least two circuit courts have cited the case on the point of responsibility. See: *Hamilton-Brown Shoe Company v. National Labor Relations Board*, 104 F. (2d) 49, at 52 (C. C. A. 8, 1939); and *C. G. Conn, Ltd., v. National Labor Relations Board*, 108 F. (2d) 390, at 400 (C. C. A. 7, 1939).

A similar view appears in the opinion of the Second Circuit Court, in *Ballston-Stillwater Knitting Co., Inc., v. National Labor Relations Board*, 98 F. (2d) 758 (C. C. A. 2d, 1938), as is evidenced by the following language (page 762):

> "There is not the slightest evidence in addition to the conduct of these 'supervisory' employees that the petitioner initiated the movement for an unaffiliated union. The most that can be inferred is that superintendent Hathorn knew that 'supervisory employees' were circulating membership cards for the Association during working hours, and that he took no step to prevent it. *As a matter of law, in our opinion, this does not amount to domination or interference by the employer.* There is no evidence that Hathorn would not have been equally lenient with regard to the circulation of petitions for membership in the CIO. Some solicitation for CIO members was done in the mills, although apparently less openly and to a less extent. No request was made for leave to circulate them openly and no demand that the circulation of Association cards be stopped. *To constitute domination or interference by the employer we think that it must appear that the employees are acting for him rather than for themselves, or that the employer in some manner gives aid to one group which he withholds from the other,*

*or discriminates in favor of members of a labor organization or against non-members.*" (Italics supplied)

Likewise, in *Cupples Company, Manufacturers, v. National Labor Relations Board,* 106 F. (2d) 100 (C. C. A. 8th, 1939), the Board had contended that since a certain employee "was shown to have been regarded and referred to as a 'forelady' or 'supervisor,' a finding that her interference and domination in connection with the formation of the Association was the interference and domination of the employer was justified."

To this the Court replied:

"* * * *What her fellow-employees of the match department may have assumed her authority to be,* and what she may have represented it to be, *we regard as unimportant* in so far as the Company is concerned, since there is no proof that her acts which are complained of were done at its direction or with its knowledge or consent. It would be strange if the efforts of the employees of the petitioner to organize and to select representatives for collective bargaining could be utterly frustrated and destroyed through attributing the acts of one of their number—who, so far as the record shows, was eligible to membership in both the Association and the Matchworker's Union—to the employer, without any showing that the employer had ever authorized, consented to, or was aware of such acts."

The two cases discussed immediately above were relied upon by the Circuit Court of Appeals for the Seventh Circuit in *Link-Belt Co. v. National Labor Relations Board,* 110 F. (2d) 506 (1940) where the Court set aside findings by the Board that certain employees had been discriminated against and that an employees' asso-

ciation was company dominated. That case is particularly pertinent here because it was shown that the employer instructed the management staff to refrain from engaging in union activities, and that the instructions were passed on to the foremen. The view of the Court on the question of responsibility is indicated by the following passage from the opinion (page 511):

> "The point is made that the fact that foreman Siskauskis attended, without participating, the first meeting of the Independent, that foreman Olson had explained to an employee the advantages of an inside union over an outside union, that one Nyberg had another employee to help organize for Independent, and that foreman McKinney had instructed an employee to solicit for Independent, is evidence of unfair labor practices. It is undisputed that Fred B. Skeats was the only person in the foundry who had the power to hire and discharge. Neither of the men involved had that power.
>
> "The mere attendance by a foreman at the meeting is not evidence of interference, and the expression by men of a dislike to organized labor does not indicate that they must be acting for the management. National Labor Relations Board v. Swank Products, Inc., supra. *We cannot believe that what they did, under all the circumstances in this case, can be charged to the company.* Ballston-Stillwater Knitting Co. v. National Labor Relations Board, 2 Cir., 98 F. 2d 758, 762; Cupples Co. etc. v. National Labor Relations Board, 8 Cir., 106 F. 2d 100, 115." (Italics supplied)

The record establishes without question that the alleged acts of interference and support attributed to the petitioner were isolated, were not accompanied by any acts of discrimination, and were both unconnected with and contrary to the petitioner's policy of non-

interference and neutrality. In *Martel Mills Corporation v. National Labor Relations Board* (Decided Sept. 6, 1940, and not yet reported) the Circuit Court of Appeals for the Fourth Circuit was faced with a question similar to the issue here in that the plant superintendent had had conversations with several employees in which the union was mentioned. The Court held that the alleged acts of interference were not binding upon the employer, saying:

> "* * * *In the absence of evidence of any policy of proscribed discrimination, an employer should not be held strictly accountable for every isolated utterance of a policy-making officer concerning union activities.* Cf. National Labor Relations Board v. Union Pacific Stages, supra, at pp. 178-179; Jefferson Electric Co. v. National Labor Relations Board, supra, at p. 956. And, where the conduct and actions of the employer fail to indicate any violation of the Act, an assemblage of unrelated, unconnected expressions of opinion does not very deeply impress this Court." (Italics supplied)

In the final analysis, the question, whether an employer is responsible for the statements or actions of its employees, is one that should be determined by an application of the familiar principles of the law of agency. The fundamental rule that should govern here was stated by this Court as early as 1827 in *The General Interest Insurance Company v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674 (1827), where it was said (12 Wheat. 412, 413):

> "* * * He is not to be considered as the general agent of the owner for all purposes whatsoever, that may have connection with the voyage. He is a special agent for navigating the vessel, and can neither bind nor prejudice his principal, by any act not coming properly within the scope and

object of such employment. *Unless the powers of agents are thus limited, no man could be safe in the transaction of any business through the agency of another.* * * * *It is a general rule, applicable to agencies of every description, that the agent cannot bind his principal except in matters coming within the scope of his authority;* * * *." (Italics supplied)

This Court expressed the same view in *Washington Gas-Light Company v. Lansden,* 172 U. S. 534, 19 S. Ct. 296 (1899), as follows (172 U. S. 544):

"The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation, and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal nor vote of the corporation constituting the agency or authorizing the act. But, in the absence of evidence of this nature, there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury. Salt Lake City v. Hollister, 118 U. S. 256, 260; Denver & Rio Grande Railway v. Harris, 122 U. S. 597, 609; Southern Railway v. Prentice, 147 U. S. 101, 109, and cases cited at p. 110."

This case was an action for damages for an alleged libel brought against the Gas Company and several of its

officers, based upon a letter written by the general manager. As there was no evidence that the general manager had express authority to write the letter, the chief inquiry of the Court was whether such authority could be inferred by reason of his position. On that point it was said (172 U. S. 547, 548):

> "From the use of the term 'general manager' we should not be authorized to infer any such authority, nor would it be permissible to allow the jury to make a mere guess that it existed. A general manager of a business corporation, such as this gas company is, would not be presumed to have this power. The term, in our judgment, when used in connection with such a corporation, cannot, in the absence of any evidence on the subject, be presumed to mean anything more than that the person filling the position has general charge of those business matters for the carrying on of which the company was incorporated. These might include the buying of material, the employment of laborers, the supervision of their labor, the manufacture of gas, its distribution, and the general ways and means of accomplishing the object of the corporation,—all these in subordination to the board of directors and such superior officers as the board should provide."

In the well-reasoned decision of the Circuit Court of Appeals for the Eighth Circuit in *Cupples Company, Manufacturers, v. National Labor Relations Board, supra*, the agency doctrine was applied, the Court, at pages 114, 115, saying:

> "It is elementary that a principal is only bound by the acts of an agent which are within the scope of the actual, implied or apparent authority of that agent. Miss Weitzel had no actual authority from the Company to encourage or discourage member-

ships in labor organizations. There is no evidence which would support a finding that she had implied authority to do so. Implied authority is nothing more than actual authority circumstantially proved. Koivisto v. Bankers' & Merchants' Fire Ins. Co., 148 Minn. 255, 181 N. W. 580; 2 C. J. 435; Hall v. Union Indemnity Co., 8 Cir., 61 F. 2d. 85, 92. So far as her apparent authority is concerned: 'It is only acts within the scope of the apparent authority with which the principal clothes the agent, not those within the scope of the apparent authority with which the agent wrongfully clothes himself, without the assent or knowledge of his principal, that are binding upon the latter.' Chicago, St. P., M. & O. Ry. Co. v. Bryant, 8 Cir., 65 F. 969, 973. See, also, Hall v. Union Indemnity Co., 8 Cir., supra, 61 F. 2d. at page 91."

Expressed from the standpoint of a third person's right to rely on statements of an agent, it has been said that the doctrine of apparent authority can be invoked only by those knowing the agent had been permitted to exercise certain authority and who have acted in reliance thereon: *Cauger v. Gray Motor Co.*, 173 Minn. 370, 217 N. W. 347.

In the instant case there was absolutely no testimony to show that any supervisor had been permitted by the petitioner to express any views or take any action detrimental to the Union. In addition, there was no attempt to show that any employee relied upon the alleged acts of interference. Finally, on this point, there can be no presumption, such as the court below indulged in, that employees were justified in believing that the supervisors were acting as the petitioner's representatives. Employees, as well as employers, are presumed to know the law (*Midland Steel Products Company v. National Labor Relations Board*, 113 F. (2d) 800 (C. C. A. 6,

1940)), and as a result must be deemed to know not only their own rights but also the limitations imposed by law upon the conduct of their employer and its agents.

In a case such as this, where the employer has a large supervisory force which carries out the policies and orders formulated and issued by the responsible executive officers, the answer to the question as to whether the employer violated the Act through the conduct of employees who acted without authority from it, should depend upon whether the employee whose conduct is under consideration was one who determined the employer's policy in connection with the matters involved. That was the test sanctioned by this Court in *National Labor Relations Board v. Sands Manufacturing Company, supra,* and it should be applied here, as it is the only one practicable where there are many employees who exercise supervisory, as distinguished from management, functions.

The decision of the Court below is completely out of harmony with the law of agency and should not be affirmed unless, under the National Labor Relations Act, employers are to be saddled with liability without fault.

In closing our argument on this point, it is fitting to observe that the Order in this case in effect holds that the petitioner has violated a statute because its supervisory employees expressed opinions which they had a constitutional right to hold and express. None of the remarks which the Board objects to was of a coercive or threatening character. They were at the most expressions of partiality. If the individuals had a constitutional right to their views and opinions, as they unquestionably did, the petitioner surely would have no right to police them.

As a result of the decision of this Court in *Thornhill v. State of Alabama,* .... U. S. ...., 60 S. Ct. 736 (1940), it is no longer open to question that the legislative branch of the Government in dealing with problems arising from industrial disputes may not impair the effective exercise of the right to discuss freely industrial relations and employment conditions.

The Circuit Court of Appeals, in a case decided since the decision in this case and the opinion in *Thornhill v. State of Alabama, supra,* has held [in *Midland Steel Products Company v. National Labor Relations Board,* 113 F. (2d) 800 (1940)] that an expression by the employer's general superintendent of an opinion derogatory to unions was not a violation of the Act as it was within the constitutional guarantee of free speech. It is noteworthy that the Court cited and relied upon *Thornhill v. State of Alabama, supra.*

Similarly in *National Labor Relations Board v. Ford Motor Company,* (Decided Oct. 8, 1940, and not yet reported) the Court below again sustained the right of freedom of speech from infringement by the Board. The Court held that Mr. Ford was entitled under the law to hold and express his views on labor unions and that the Ford Motor Company had a right under the First Amendment to distribute the pamphlets setting such views forth so long as the distribution thereof was not connected with any threat of discharge or discrimination. The keystone of the opinion on this point is in the following passage, where it was said:

> "* * * *If the concept that an employer's opinion of labor organizations and organizers must,* because of the authority of master over servant, *nearly always prove coercive, ever had validity, it is difficult now to say,* in view of the National Labor Relations Act, its adjudication as constitutionally

valid, its strict enforcement by the National Labor Relations Board, and the liberal attitude of the courts in construing it so as best to effectuate its great social and economic purpose, *that the concept is still a sound one.* The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied." (Italics supplied)

Very recently the Circuit Court of Appeals for the Seventh Circuit held, in *National Labor Relations Board v. Lightner Publishing Corporation,* 113 F. (2d) 621 (1940), that statements derogatory to unions in the respondent's publications could not be relied upon by the Board to show bad faith in negotiations with its employees' bargaining agent, saying (page 626):

"No expression of an employer's opinion, as such, on any subject can constitute an unfair labor practice; and obviously the National Labor Relations Board has no authority to interfere with an employer's untrammeled expression of views on any subject."

It has been aptly said in a recent case that the constitutional right of free speech in regard to labor matters is just as clearly a right of employers as of employees, and if the Act purported to take away this right, it could not stand: *Continental Box Co., Inc., v. National Labor Relations Board,* 113 F. (2d) 93 (C. C. A. 5, 1940). In that case the employer issued a statement of its policy the night before a consent election was to be held among its employees. The Board seized upon the statement as a violation of the employees' rights to be free from interference, restraint and coercion. In holding that the employer had a right to publish the statement of its policy as long as it was not a use of

economic power to coerce the employees, the Court said at pages 96 and 97:

> "We do not agree with the Board that the statement of policy the company sent out just before the election, in any manner violates the letter or spirit of the Act or, standing alone, is any evidence that the employer was undertaking to interfere with or dominate its employees or any association they would form. The constitutional right of free speech (Const. amend. 1) in regard to labor matters is just as clearly a right of employers as of employees, and if the act purported to take away this right, it could not stand. Bryan Thornhill v. State of Alabama, 60 S. Ct. 736, 84 L. Ed. . . . .; National Labor Relations Board v. Express Publishing Company, 5 Cir., 111 F. 2d 588; Magnolia Petroleum Company v. National Labor Relations Board, supra; Humble Oil and Refining Company v. National Labor Relations Board, supra. But the enforced statute has not undertaken at all to interfere with or limit the right of free speech. All that the statute prohibits is domination, interference and support. The employer has the right to have and to express a preference for one union over another so long as that expression is the mere expression of opinion in the exercise of free speech and is not the use of economic power to coerce, compel or buy the support of the employees for or against a particular labor organization."

To hold the petitioner responsible for the statements which its employees are alleged to have made in this case is to command the petitioner, *at its peril*, to limit and infringe the freedom of speech its employees possess as free men. Neither the Board nor any court should have authority to impose that duty upon an employer.

All questions of freedom of speech aside, the activities proscribed by Section 8(1) of the Act are *interference, restraint and coercion.* The test against which an employer's statements on union matters must be measured is whether the statements are calculated to interfere with, restrain or coerce the employee to whom they are directed in his exercise of his rights under the Act. That is substantially the test prescribed by this Court in *Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 50 S. Ct. 427 (1930) where the Court, speaking through Chief Justice Hughes, said at page 568:

> "* * * The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis. Virginia v. Tennessee,* 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known applications of the law with respect to fraud, duress, and undue influence * * *."

Under the principle there established, there is not one instance in this record of any statement or action on

the part of any responsible officer of the company that is a violation of the Act. Had the Court below followed the *Texas & New Orleans* case (as it did in *Midland Steel Products Company v. National Labor Relations Board, supra,* and should have here) it would have had to hold that there was no interference, restraint or coercion under Section 8(1) nor any interference or domination under Section 8(2).

## Conclusion.

For the reasons hereinabove stated, the petitioner submits that the judgment of the Court below should be reversed with directions to set aside the Order of the Board in its entirety.

Respectfully submitted,

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## APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449; 29 U. S. C. A. Section 151, *et seq.*) are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, im-

pairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid for protection.

SECTION 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from per-

mitting employees to confer with him during working hours without loss of time or pay.

* * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

SECTION 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

SECTION 10 (c). The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the

Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

SECTION 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

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